TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1917.

No. [redacted] 365

THEODORE S. BOWES AND ABRAHAM WAGNER, PETITIONERS,

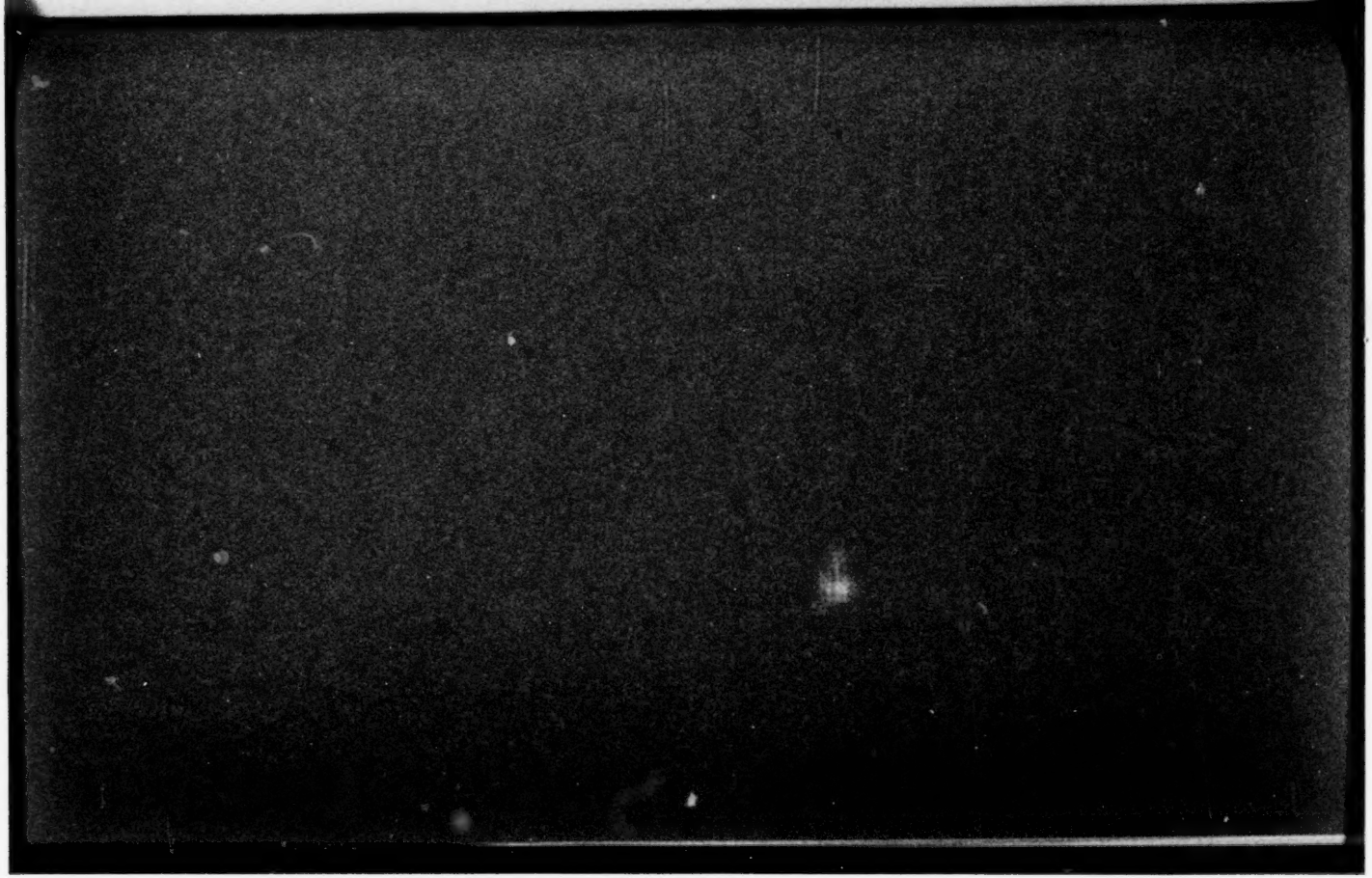
vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

[redacted]

[redacted]



(25,698)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 868.

THEODORE S. ROSEN AND ABRAHAM WAGNER, PETITIONERS,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print
Caption	*a*	1
Transcript of record from the district court of the United States for the eastern district of New York	1	1
Writ of error	1	1
Indictment	2	2
Docket entries	5	3
Bill of exceptions	8	5
Testimony of Samuel Broder	8	5
Verdict	14	8
Motion to set aside verdict	14	8
Judge's certificate	14	8
Exhibit A—Judgment in case of State *vs.* Broder	16	9
Petition for allowance of appeal	17	9
Assignment of errors	19	11
Order allowing writ of error	21	12
Citation	22	12
Stipulation as to record	23	13
Certificate of clerk	24	13
Opinion, Coxe, J.	25	14
Opinion, Ward, J., dissenting	29	15
Judgment	33	17
Clerk's certificate	35	17
Writ of certiorari and return	36	18

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 18, 1917.

Original.

United States Circuit Court of Appeals, for the Second District.

THEODORE S. ROSEN AND ABRAHAM WAGNER, Plaintiffs-in-Error (Defendants below),

vs.

UNITED STATES OF AMERICA, Defendant-in-Error (Plaintiff below).

RECORD ON APPEAL.

Meier Steinbrink, Attorney for Plaintiff-in-Error, Theodore S. Rosen, 215 Montague Street Borough of Brooklyn, City of New York.

Bick & Freedman, Attorneys for Plaintiff-in-Error, Abraham Wagner, 215 Montague Street, Borough of Brooklyn, City of New York.

Melville J. France, United States District Attorney, Attorney for Defendant-in-Error, United States Post Office Building, Borough of Brooklyn, City of New York.

1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Eastern District of New York, Greetings:

Because in the record and proceedings, as also in the verdict of the jury and the judgment entered thereon before you or some of you between Abraham Wagner and Theodore S. Rosen, the plaintiffs-in-error, and the United States, the defendant-in-error, a manifest error hath happened, to the great damage of the said Abraham Wagner and Theodore S. Rosen, as is said and appears by the complaint: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the court room of said court in the Post Office Building in the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 15th day of March, 1916; that the records and proceedings aforesaid being inspected, the said Judges of the Circuit Court of Appeals may cause further to be done therein, to correct that error what of right and according to the law and custom of the United States ought to be done.

2 Witness, Honorable Thomas I. Chatfield and Honorable Van Vechten Veeder, United States District Judges, this 15th day of February, in the year of our Lord, one thousand nine hundred and sixteen.

[SEAL.]

PERCY G. B. GILKES,
Clerk of the District Court of the Eastern District of New York.

The foregoing writ is hereby allowed.

THOMAS I. CHATFIELD,
U. S. D. J.

Indictment.

District Court of the United States of America, for the Eastern District of New York.

At the Stated Term of the District Court of the United States of America, for the Eastern District of New York, begun and held in the Borough of Brooklyn, City of New York, within and for the District aforesaid, on the sixth day of October, in the year of our Lord one thousand nine hundred and fifteen, and continued by adjournment to and including the ninth day of November, in the year of our Lord one thousand nine hundred and fifteen.

EASTERN DISTRICT OF NEW YORK, *ss:*

The Grand Jurors of the United States of America, within and for the district aforesaid, on their oaths present that Theodore
3 S. Rosen, Abraham Wagner and Samuel Broder, each of them late of the Borough of Brooklyn, County of Kings, State and Eastern District of New York, heretofore, to wit: on various days and times between the first day of September, nineteen hundred and fifteen, and the tenth day of September, nineteen hundred and fifteen, at the Borough of Brooklyn, County of Kings, State and Eastern District of New York, and within the jurisdiction of this Court, knowingly, willfully and unlawfully did conspire, combine, confederate and agree together to commit an offense against the United States, that is to say, did knowingly, willfully and unlawfully conspire, combine, confederate and agree together to buy, receive, and aid in buying and receiving, certain checks and letters which said checks and letters had theretofore been placed in the mails of the United States for mailing and delivery and which said checks and letters had theretofore been stolen, taken and abstracted from and out of duly authorized depositories for mail matter of the United States, and which said checks and letters were known to the said Theodore S. Rosen, Abraham Wagner and Samuel Broder to have been so stolen, taken and abstracted as aforesaid;

And the Grand Jurors aforesaid, on their oath aforesaid, do further present, that in furtherance of the said unlawful conspiracy, combination, confederation and agreement, and in order to effect the

object of the same, the said Theodore S. Rosen, Abraham Wagner and Samuel Broder, and each of them, did, on or about the sixth day of September, nineteen hundred and fifteen, at the Borough of Brooklyn, County of Kings, state and Eastern District of New York, and within the jurisdiction of this Court, knowingly, willfully and unlawfully buy and receive, and aid in buying and receiving, a certain check, which said check had theretofore been placed
4 in an envelope for mailing and delivery, and which said check and envelope had theretofore been stolen, taken and abstracted from a duly authorized depository for mail matter of the United States, which said check was in the words and figures as follows:

"No. 3602.

HARTFORD, CONN., Sept. 4, 1915.

The Fidelity Trust Company.

Pay to the Order of Joseph D. Zerwich Nineteen 08/100 Dollars $19.08.

MAX SHULMAN."

(On left hand margin:) Max Shulman, General Merchandise, 820-826 Park St."
(On the back thereof:) "Joseph D. Zerwich, A. Wagner."

and which said check was known to the said Theodore S. Rosen, Abraham Wagner and Samuel Broder to have been so stolen, taken and abstracted as aforesaid, against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States in such case made and provided.

MELVILLE J. FRANCE,
United States Attorney for the Eastern District of New York.

5 Endorsed: Crim. 1-382. 1670. United States District Court, Eastern District of New York. The United States of America vs. Theodore S. Rosen, Abraham Wagner and Samuel Broder. Indictment. Section 37 and 194 C. C.. Melville J. France, United States Attorney, Federal Building, Borough of Brooklyn, New York City, N. Y. A true bill. C. G. Ingersoll, Foreman. Filed Nov. 9th, 1915.

November 10, 1915.—Defendants Rosen and Wagner arraigned. Each pleads not guilty. Bail fixed at $5,000 as to each for January term, 1916. Said defendants remanded. Bail given by Rosen. Recognizance filed.

November 11, 1915.—Defendant Wagner present on motion of Mr. Bick. Bail reduced to $3,500.00. Bail given. Recognizance filed by Wagner.

November 12, 1915.—Notice of motion and affidavit filed on behalf of Wagner for bill of particulars.

6 November 16, 1915.—Defendant Broder arraigned. Plea guilty. Remanded for sentence.

November 17, 1915.—Motion for bill of particulars on behalf of Wagner argued and submitted.

November 18, 1915.—Decision rendered. Motion for bill of particulars denied (endorsed on papers).

January 5, 1916.—Case called. Defendants Rosen and Wagner present. Indictment severed as to Broder and defendants Rosen and Wagner ordered to return Jan. 25, 1916, at 10.30.

January 25, 1916.—Case called. Defendants Rosen and Wagner present. Case adjourned to and Defendants Rosen and Wagner ordered to return Jan. 26, 1916.

January 26, 1916.—Case called. Defendants Rosen and Wagner present. Jury drawn and sworn. Trial suspended to and defendants Rosen and Wagner ordered to return Jan. 27, '16, at 10 A. M.

January 27, 1916.—Trial resumed and suspended to Jan. 28, 1916, at 10 A. M. Defendants Rosen and Wagner present. Ordered to return Jan. 28 at 10 A. M.

January 28, 1916.—Trial resumed and suspended until Jan. 29, 1916, at 10 A. M. Defendants Rosen and Wagner present ordered to return Jan. 29, 1916, at 10 A. M.

7 January 29, 1916.—Trial resumed and concluded. Verdict guilty with recommendation of mercy as to both Rosen and Wagner. Defendants Rosen and Wagner remanded until Feb. 2, 1916, and January term, 1916, extended to Feb. 10, 1916. Order entered for sustenance for jurors.

February 2, 1916.—Sentence of Rosen and Wagner postponed until Feb. 8, 1916.

February 8, 1916.—Case called. Defendants Rosen and Wagner called. Present, Asst. U. S. Attorney Beer moves sentence. Defendant Theodore S. Rosen sentenced to be imprisoned for eighteen months (18) and defendant Abraham Wagner for one (1) year and one (1) day. Both sentences to be executed in U. S. Penitentiary at Atlanta, Ga. January, 1916, term extended to March 1, 1916. Writs of commitment issued (2).

February 15, 1916.—Petition and assignment of error filed. Order entered allowing writ of error, etc. Writ of error issued. Writ of error and citation filed. Joint bail in $5,000.00 to be given.

February 16, 1916.—Defendants Rosen and Wagner present. Court ordered that upon said defendants executing and filing a proper bail bond, their sentence will be stayed and said defendants ordered to return April 5, 1916. Joint bail bond filed returnable April 5, 1916.

March 8, 1916.—Bill of exceptions filed.

8 *Bill of Exceptions.*

United States District Court, Eastern District of New York.

UNITED STATES OF AMERICA

against

THEODORE S. ROSEN and ABRAHAM WAGNER.

JANUARY 27, 1916.

The defendant Broder having pleaded guilty previously and remanded for sentence, the indictment as to Rosen and Wagner was severed and continued as to them. The case of Rosen and Wagner was called for trial on January 27, 1916, before the Court with a jury, which had been duly examined, accepted and sworn. The District Attorney, both defendants and the attorney for each were present. Mr. Beer Assistant United States Attorney, addressed the jury and called as a witness Samuel Broder, who was in Court.

SAMUEL BRODER, called as a witness on behalf of the Government:

Mr. Steinbrink: Before the witness is sworn we wish to object on the ground of the witness's incompetency, and we produce here the certified copy of his conviction for a felony.

The Court: I think it is well understood that under the law
9 which governs Federal courts, conviction for a felony carries with it the loss of the right to testify unless in some matter that directly concerns a charge against the defendant himself, but that rule of law has been universally modified since by statutes in the various states limiting the effect of sentences, where disqualifications of citizenship are effected by the State statutes. In the State of New York, conviction with a suspended sentence, or conviction followed by a sentence to Elmira Reformatory, does not carry with it the loss of citizenship, so that for two reasons—one, that the defendant is a co-defendant, and therefore, may make a statement as to the matters with which he is concerned, and also for the reason that this paper, which you may mark Exhibit A on behalf of the defendants, shows that his sentence was to the Elmira Reformatory, I will hold the man has not lost the right to testify as a witness in the case

Mr. Steinbrink: Will your Honor bear in mind the fact that the indictment here has been ordered severed, so he does not stand in this case as a co-defendant.

The Court: I am not placing it (as apart from the other rule) upon the ground that he is a co-defendant on trial. I do not think that reason of itself would be sufficient because the man is not on trial, and has no more to do with this particular trial than if he happened to be under arrest for an altogether different crime.

Mr. Steinbrink: I make that statement to your Honor because you said he had the right to make a statement. Will your Honor permit me (not to dissuade your Honor's conclusion if you have already

concluded) to ask your Honor to look at the case of United States against Maxey, 207 Federal Reporter.

The Court: Decided in what State?

10 Mr. Steinbrink: I don't know which jurisdiction it was in, but I presented this same question to United States Judge Bradford in Delaware, and on the basis of the Maxey case he upheld the contention.

The Court: What page?

Mr. Steinbrink: Page 331 is the salient part of it. That also was an indictment for conspiracy. Beginning "We are not unmindful that the trend of modern opinion."

The Court: My attention has been called to the case of Maxey against the United States, which is the authority referred to, 207 Federal, 327, in which, upon the authority of Logan against U. S. 144 U. S. 263, it is said that the common law as it was known in this country when the Judiciary Act of 1789 was enacted, controls the admissibility of testimony in criminal cases. And at the time the Logan case was decided it was said that it had been an established practice for sixty years. It is evident now that the practice has been established for over 125 years, and under the Logan case competency is—except so far as Congress has made specific provisions upon the subject—governed by the common law. The provisions of common law of the State of New York is the same as the common law of the United States. Where a sentence has been suspended no conviction has been completed, and the procedure in Court prior to sentence is no conviction within the meaning of the statutes which disqualify the person who has been "convicted" from the rights of citizenship.

In the case of Maxey against the United States, supra, the head-note says that the law of the United States Courts in criminal cases is the common law of the State where the trial is had, as it was when "such courts" were established. I think the head-note seems to be misleading, because the decision was as to the common law at

11 the time the courts of the United States were established. The decision goes on to say that the common law of Texas, which was in question, was the same as the general common law in 1789, and then states what that was. The head-note that the common law of the State (at a time years before the State was formed) would be the test, is an inaccurate statement.

It has been always held within the boundaries of the State of New York that sentence, or the disposition of a case, which was equivalent to a suspension of sentence, or so as to save disqualification by a sentence under the statute, was not a sentence for a felony. The Elmira Reformatory was created, and is authorized, to take prisoners in the case of boys under twenty-one, who shall not thereby be made felons, and so, when a Federal court sends a man in New York State to the Elmira Reformatory, it is merely doing a thing which under the common law would be equivalent to suspending sentence so far as citizenship is concerned. While I do not know whether the question has been passed upon or disposed of before, I think that is the better rule, and according to law. I overrule the objection.

Mr. Steinbrink: May I add the test of common law was not what

was the punishment meted to the defendant. The test was the crime of which he was convicted, an infamous crime; was it a felony?

The Court: I have said the conviction is not a complete conviction so as to carry the loss of citizenship until the Court acts upon that conviction, or there is some record of sentence making the defendant a felon. It has never been held that where a sentence has been entirely suspended (where, therefore, the Court has taken no action) whether the verdict should control and the man should lose
12 citizenship. I am not going to start that unless authority says so.

Mr. Steinbrink: I agree with your Honor, but here is a certificate which shows a conviction for a felony and sentence in Elmira, which has not been held to be a suspension for this reason. It happens when he was convicted he was under twenty-one. Had he been twenty-one the Court could have sent him to Sing Sing, and if that was so he would be disqualified, and the fact that he lacked by days, months or weeks being under twenty-one does not change the rule of law.

The Court: I have said it has never been done that I know of. I have also said the sentence to Elmira being equivalent to a suspension of sentence—that being the question I am concerned with—I shall consider it the equivalent of a suspension of sentence and overrule the objection.

Mr. Steinbrink: We except.

Case proceeds.

BRODER sworn, warned and testified voluntarily in part as follows:

Direct examination.

By Mr. Beer:

Q. You are jointly indicted with Theodore S. Rosen, this man sitting over here, and this Wagner, on the charge of conspiracy?

A. Yes.

Q. And you pleaded guilty?

A. I did.

Q. You had a conversation with me and with the various officers of the Government about how this thing transpired?

A. I did.

Q. How the conspiracy happened?

A. Yes.

Q. You were convicted and sent to Elmira when?

A. January 27, 1914.

13 Q. What were you sent there for?

A. Forgery.

Q. Tell us the circumstances of that forgery?

Mr. Steinbrink: I object, incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. Was it for stealing checks from the mail?

Mr. Steinbrink: I object, incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. How long are you out of Elmira?
A. Since April 20, 1915.
Q. How old were you when you left Elmira?
A. Nineteen years, nineteen and a half.

Other testimony heard.

Motion made at the close of the Government's case on January 28th, 1916.

Mr. Steinbrink: We renew the motions made at the opening, on the grounds made at that time, and now on the ground that under the indictment a crime has not been made out.

The Court: I think there is some evidence for a question of fact, and deny the motions separately.

Mr. Steinbrink: To which we respectfully except.

Mr. Bick: I join in the motion on behalf of Wagner, and particularly on the ground that without Broder's testimony no crime has been shown.

The Court: Denied.

Mr. Bick: Exception.

Motion made at the close of testimony on January 29, 1916.

14 Mr. Steinbrink: We renew the motions made at the close of the Government's case.

The Court: I shall deny them and leave the question with the jury, and give you an exception.

Jury charged by Court.

Jury retires.

Jury returns.

Verdict "guilty."

Mr. Bick: On behalf of both defendants, I move to set aside the verdict on the ground that it is against the weight of evidence, and on all the grounds assigned at the opening of the case by counsel for the defendants, and on the ground that the testimony of Broder was incompetent and that a new trial should be granted and his testimony excluded.

The Court: I will deny the motion.

Mr. Bick: Exception.

February 8, 1916.—Sentence imposed upon both defendants.

No other exceptions to the rulings of the Court upon admission of testimony and no other testimony has any bearing upon the questions raised by the exceptions presented herein.

The testimony of Broder was material and comprised the major part of the testimony offered by the Government.

No exception was taken by either side to the charge by the Court and the charge involved in no way the question herein raised.

15 The foregoing bill of exceptions hereby approved.

MELVILLE J. FRANCE,
United States Attorney.
MEIER STEINBRINK,
Attorney for Defendant Rosen.
BICK & FREEDMAN,
Attorneys for Defendant Wagner.

Settled and allowed as bill of exceptions.
March 8, 1916.

THOMAS I. CHATFIELD,
U. S. D. J.

16 EXHIBIT A.

At a Court of General Session of the Peace of the City and County of New York, holden in and for the County of New York, at the Building for Criminal Courts in the Borough of Manhattan of the said City, on Wednesday, the 28th day of January, in the year of our Lord one thousand nine hundred and fourteen.

Present: The Honorable Charles C. Nott, Jr., Judge of the Court of General Sessions, Justice.

THE PEOPLE OF THE STATE OF NEW YORK

against

SAMUEL BRODER.

On Conviction by Confession of Forgery in the Second Degree.

The Court being satisfied that the said Samuel Broder is 18 years of age, and has not been previously convicted and sentenced for a felony;

Whereupon it is ordered and adjudged by the Court that the said Samuel Border, for the felony aforesaid, whereof he is convicted, be imprisoned in the New York State Reformatory, at Elmira, there to be dealt with according to law.

A true extract from the minutes.

[SEAL.] EDWARD R. CARROLL,
Clerk of Court.

(10 cts. Stamp cancelled.)

17 *Petition for Allowance of Appeal.*

United States District Court, Eastern District of New York.

UNITED STATES OF AMERICA

vs.

THEODORE S. ROSEN and ABRAHAM WAGNER, Defendants.

To the Honorable Judges of the Circuit Court of the United States for the Second Circuit, in and for the Eastern District of New York:

The petition of Theodore S. Rosen and Abraham Wagner, respectfully shows:

First. That by virtue of a verdict of guilty rendered on the 29th day of January, 1916, after a trial before the Honorable Thomas I. Chatfield and a jury, the said Theodore S. Rosen was sentenced by the Honorable Thomas I. Chatfield on the 8th day of February, 1916, to be imprisoned for a term of eighteen months in the Federal Prison at the Atlanta Penitentiary; and the said Abraham Wagner was sentenced by the Honorable Thomas I. Chatfield on the 8th day of February, 1916, to be imprisoned for a term of one year in the Federal Prison at the Atlanta Penitentiary.

Second. That said conviction was had upon the trial of an indictment charging them with the violation of Sections 37 and 194 of the Criminal Code of the United States.

Third. That after said conviction and sentence, defendants obtained a stay of the execution of said sentence so that they might be kept within the County of Kings, State of New York, until
18 March 1st, 1916, though the sentence was to begin to run from the 8th day of February, 1916; and they as well obtained time in which to prepare the case and exceptions and assignment of errors for the purpose of appealing to the United States Circuit Court of Appeals for the Second Circuit, on the ground that said conviction was contrary to law and against the weight of evidence, and upon the exceptions,—these assignments of errors, however, being confined to the question of the competency of one Samuel Broder who had previously been convicted of a felony, and whose incompetency as a witness was urged upon the trial, and upon whose testimony the entire case of the Government depended.

Wherefore, your petitioners feeling themselves aggrieved by said conviction and sentence, appeal to the Circuit Court of Appeals of the United States in and for the Second Circuit, and pray that this appeal may be allowed, and that a transcript of so much of the trial as is necessary to present the exceptions presented, together with the orders and proceedings thereunder, may be transmitted to the Circuit Court of Appeals for review therein.

Dated, Brooklyn, N. Y., February 15th, 1916.

MEIER STEINBRINK,
Attorney for Theodore S. Rosen, Plaintiff-in-Error.
BICK & FREEDMAN,
Attorney for Abraham Wagner, Plaintiff-in-Error,
215 *Montague Street, Brooklyn, N. Y.*

Petition of appeal allowed.

THOMAS I. CHATFIELD,
District Judge of the United States for the Eastern District of New York, in the Second Circuit.

19 *Assignment of Errors.*

United States District Court, Eastern District of New York.

UNITED STATES OF AMERICA

vs.

THEODORE S. ROSEN and ABRAHAM WAGNER, Defendants.

And now come the plaintiffs in error, Theodore S. Rosen, by Meier Steinbrink, his attorney, and Abraham Wagner, by Bick & Freedman, his attorneys, and make and file the following assignment of errors:

First. One Samuel Broder was called as a witness for the Government, and objection was taken to his competency as such witness on the ground that it appeared from Exhibit A, which was then marked in evidence, that the said Samuel Broder had previously been convicted and sentenced for a felony, to-wit: forgery in the second degree. The objection was thereupon overruled by the Court, and exception duly noted.

Second. From the testimony of Samuel Broder, it subsequently appeared by his own admission that he had been previously convicted and sentenced for a felony, to-wit: forgery in the second degree; but the objection to his competency was overruled, and exception duly noted.

Third. At the close of the prosecution's case, a motion was
20 made to dismiss the indictment and direct a verdict of acquittal, upon the ground set forth in the motion, as appears from the record, and in that with the testimony of Samuel Broder eliminated, no crime had been proven against either Theodore S. Rosen or Abraham Wagner, and that the denial of the defendant's motion was error.

Fourth. At the close of the entire case, a motion was made to dismiss the indictment and direct a verdict of acquittal, upon the ground set forth in the motion, as appears from the record, and in that with the testimony of Samuel Broder eliminated, no crime had been proven against either Theodore S. Rosen or Abraham Wagner, and that the denial of the defendants' motion, was error.

Fifth. Upon the rendition of the verdict by the jury, a motion was made to set aside the verdict upon the ground, among others, that the testimony of the said Samuel Broder was incompetent and improperly received, because of his previous conviction for a felony, and that with the testimony of Samuel Broder eliminated, no crime had been proven against either Theodore S. Rosen or Abraham Wagner, and that the denial of the motion was error.

MEIER STEINBRINK,
Attorney for Theodore S. Rosen,
Plaintiff in Error.

BICK & FREEDMAN,
Attorneys for Abraham Wagner,
Plaintiff in Error.
215 *Montague Street, New York, N. Y.*

21 *Order Allowing Writ.*

At a Stated Term of the United — District Court for the Eastern District of New York, held at the Post Office Building, in the Borough of Brooklyn, City of New York, on the 15th day of February, 1916.

Present: Hon. Thomas I. Chatfield, United States District Judge.

ABRAHAM WAGNER and THEODORE S. ROSEN, Plaintiffs in Error,

against

UNITED STATES, Defendant in Error.

Upon motion of Bick & Freedman and Meier Steinbrink, attorneys for the plaintiffs-in-error, and upon filing a petition for a writ of error, it is

Ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Second Circuit, the judgment heretofore entered herein, and that it is further

Ordered, that such writ shall operate as a supersedeas and suspend and operate as a stay of proceedings in this court, and that the plaintiffs-in-error be admitted to bail upon giving a joint bond in the sum of $5,000 with sufficient sureties, pending their appeal and conditioned that the said plaintiffs-in-error shall abide the judg-

22 ment of the Circuit Court of Appeals therein and surrender themselves into this Court when required by this Court or at the determination of said appeal.

THOMAS I. CHATFIELD,
U. S. D. J.

Citation.

By the Honorable Thomas I. Chatfield, one of the District Judges sitting in the District Court of the United States for the Eastern District of New York, in the Second Circuit, to The United States of America:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit to be holden at the Borough of Manhattan, in the City of New York, on the 15th day of March, 1916, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Eastern District of New York, wherein Abraham Wagner and Theodore S. Rosen are plaintiffs-in-error and the United States is defendant-in-error, to show cause, if any there be, why the error in said judgment mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Brooklyn, in the City of New York, in the District and Circuit above named, this 15th day of

February, in the year of our Lord one thousand nine hundred and sixteen.

THOMAS I. CHATFIELD,
U. S. D. J.

23 *Stipulation.*

United States District Court, Eastern District of New York.

THEODORE S. ROSEN and ABRAHAM M. WAGNER, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendants in Error.

It is hereby stipulated and agreed that the foregoing printed pages is a true transcript of the record in the above entitled action agreed upon between the parties hereto, and certification thereof by the Clerk of the District Court of the Eastern District of New York, may be made.

Dated, Brooklyn, New York, March 21, 1916.

MELVILLE J. FRANCE,
United States Attorney,
Eastern District of New York.
MEIER STEINBRINK,
Attorney for Plaintiff in Error
Theodore S. Rosen.
BICK & FREEDMAN,
Attorneys for Plaintiff in Error
Abraham M. Wagner.

24 *Certificate of Clerk.*

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, Percy G. B. Gilkes, Clerk of the District Court of the United States, for the Eastern District of New York, do hereby certify that the annexed is a true transcript of the indictment, bill of exceptions, orders and all appeal papers made up to be transmitted to the United States Circuit Court of Appeals, for the Second Circuit, on writ of error of the defendants in the matter of the indictment of the United States of America, against Theodore S. Rosen and Abraham Wagner.

In witness whereof, I have hereunto set my hand and the seal of this Court, this 22nd day of March, 1916.

PERCY G. B. GILKES, *Clerk,*
By J. G. COCHRAN,
Deputy Clerk.

25 United States Circuit Court of Appeals, for the Second Circuit.

THEODORE S. ROSEN AND ABRAHAM WAGNER, Plaintiffs-in-Error (Defendants below).

against

UNITED STATES OF AMERICA, Defendants-in-Error (Plaintiff below).

Before Coxe, Ward and Hough, Circuit Judges.

Meier Steinbrink, Esq., Attorney for Rosen.
Messrs. Bick & Freedman, Attorneys for Wagner.
Melville J. France, Esq., U. S. Attorney, for the United States.

COXE, *J.*:

On the trial of Rosen and Wagner, indicted for tampering with the United States mail, a witness named Broder was called by the Government. He was jointly indicted with Rosen and Wagner and pleaded guilty. The record of his conviction in the General Sessions of New York of the crime of forgery in the second degree was offered in evidence. Objection was taken by defendants to Broder's competency as a witness but it was overruled. Was Broder a competent witness? He was at the time of his trial about eighteen years of age and was sent to the Elmira Reformatory. No
26 time limit was fixed by his sentence. The trial judge in the case at bar considered it the equivalent of a suspended sentence. We are unable to find an authority exactly in point but we think the decision in the court below was in accordance with the trend of modern opinion. Broder was not of age at the time and was convicted of the crime of forgery. Sending him to Elmira was for the purpose of reforming him if possible and should not have the stigma of a prison sentence for a term of years. The theory upon which Elmira was founded and is operated was to reform and save young men who have, perhaps, thoughtlessly entered upon a career of wrong doing. It is a school, and reformatory; it is not a prison. It would be a misfortune if it were held that proof of a sentence to Elmira alone disqualifies a witness and stigmatizes him for all time as a person unworthy of credence.

The raison d'être of the reformatory is to bring about the direct opposite of this: it is to reform and not to punish: to uplift, encourage and help the young men sent there.

We know of no case where a commitment to Elmira has been held to disqualify a witness and see no reason why an exception should be made of the present case.

The tendency of modern thought is towards the abolition of the archaic rules which undertook to declare, arbitrarily, who were and who were not entitled to credence as witnesses and who
27 should be absolutely debarred from taking the stand. All this is changed and now in most enlightened and progressive

jurisdictions the tendency is to receive all the testimony bearing upon the issue, irrespective of the character of the witness who gives it. Proof of the commission of a crime discredits a witness but it does not absolutely exclude him from the witness stand.

The judgment is affirmed.

28 (Endorsed:) United States Circuit Court of Appeals, for the Second Circuit. Theodore S. Rosen et al., against The United States. Opinion. Coxe, J. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 14, 1916. William Parkin, Clerk.

29 United States Circuit Court of Appeals, for the Second Circuit.

THEODORE S. ROSEN AND ABRAHAM WAGNER, Plaintiffs-in-Error (Defendants below),

against

UNITED STATES OF AMERICA, Defendants-in-Error (Plaintiff below).

Before Coxe, Ward and Hough, Circuit Judges.

WARD, *Circuit Judge* (dissenting):

The question in this case is purely one of evidence, viz., did the judgment of conviction of Broder in the courts of the State of New York of the crime of forgery on his own confession make him incompetent as a witness in a criminal action in the District Court of the United States sitting in the State of New York? It has been frequently decided by the Supreme Court that the laws of the State in which the action is tried as to evidence do not apply to criminal cases in the courts of the United States. There being no Federal statute regulating the subject, it must be determined in the Federal courts by the common law existing in the State of New York at the time of the enactment of the Judiciary Act in 1789, United States v. Reid, 12 How. 361. See also Moore v. United
30 States, 91 U. S. 271; Schreiber v. Sharpless, 110 U. S. 76; United Copper Securities Co. v. Amalgamated, 232 Fed. Rep. 574. By that common law witnesses who were infamous were incompetent and those who had been convicted of treason, felony or crimen falsi were infamous, Greenleaf on Evidence, Sec. 373.

In Logan v. United States, 144 U. S. 263, 298-303, it was held that the competency of witnesses in a criminal case tried in the Circuit Court of the United States for the Northern District of Texas was governed not by the law of Texas but by the common law. A witness who had been convicted of felonious homicide in the courts of North Carolina was held competent, apparently on the ground that any disqualification created by the laws of North Carolina could have no effect beyond the limits of that state. A witness who had been convicted of larceny in the courts of Texas was also held

competent because he had received a full and unconditional pardon from the Governor. If the question of competency was to be decided by the common law, as the court held, it would seem as if both witnesses should have been held incompetent because the judgment of conviction in each case showed that the witness had been convicted of an offense which was a felony at common law rendering him infamous. However this may be, it cannot be assumed that the court intended to depart from its prior decisions.

There is no question in this case of enforcing the judgment of the State Court. It has been completely enforced. The question is as to its effect when offered in evidence. That a judgment
31 of conviction in a State Court should have one quality as evidence in the State Courts and quite a different one in the Federal courts is not illogical. When the sovereigns differ one must yield and the Supreme Court has persistently held that Congress did not intend the states to control in respect to evidence in criminal cases. Broder, the witness in this case, had been convicted in a court of the State of New York of what was at common law crimen falsi, viz., forgery. As the judgment had not been reversed and he had not been pardoned, his testimony should have been excluded. Such is the rule in the Federal courts, though not in the courts of New York. If it is antiquated and the judgment of conviction should go only to the credibility of a witness, Congress and not the courts should make the change. This was the view taken in a similar case by the Circuit Court of appeals for the Eighth Circuit in Maxey v. United States, 207 Fed. Rep. 327.

32 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. Theodore S. Rosen et al., against The United States. Dissenting Opinion. Ward, Circuit Judge. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 14, 1916. William Parkin, Clerk.

33 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, Held at the Court Rooms in the Post Office Building in the City of New York, on the 24th day of November, one thousand nine hundred and sixteen.

Present:

Hon. Alfred C. Coxe, Hon. Henry G. Ward, Hon. Charles M. Hough, Circuit Judges.

THEODORE S. ROSEN and ABRAHAM WAGNER, Plaintiffs in Error,

v.

UNITED STATES, Defendant in Error.

Error to the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

A. C. C.

34 Endorsed: United States Circuit Court of Appeals, Second Circuit. Theo. S. Rosen & ano. v. U. S. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 24, 1916. William Parkin, Clerk.

35 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 34, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Theodore S. Rosen and Abraham Wagner against United States, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 29th day of November in the year of our Lord One Thousand Nine Hundred and sixteen and of the Independence of the said United States the One Hundred and forty-first.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

36 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Theodore S. Rosen and Abraham Wagner were plaintiffs in error, and The United States of America was defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and re-

37 moved into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-second day of March, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 25,698. Supreme Court of the United States. No. 868. October Term, 1916. Theodore S. Rosen and Abraham Wagner, vs. The United States. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 27, 1917. William Parkin, Clerk.

38 & 39 United States Circuit Court of Appeals for the Second District.

THEODORE S. ROSEN and ABRAHAM WAGNER, Plaintiffs-in-Error,
against
UNITED STATES OF AMERICA, Defendants-in-Error.

It is hereby stipulated and agreed that the certified transcript of record now on file in the office of the Clerk of the United States Supreme Court be taken as a return to the writ of certiorari granted herein by the Supreme Court of the United States on the 22nd day of March, 1917, and that this stipulation be filed with the Clerk of the United States Circuit Court of Appeals for the Second Circuit, and a certified copy of this stipulation be sent by him as his return to the writ aforesaid.

Dated, March 26th, 1917.

MEIER STEINBRINK,
Attorney for Plaintiffs-in-Error.
JOHN W. DAVIS,
Solicitor General.

40 [Endorsed:] United States Circuit Court of Appeals for the Second District. Theodore S. Rosen and Abraham Wagner, Plaintiffs-in-Error, against United States of America, Defendants-in-Error. Stipulation. Meier Steinbrink, Attorney for Rosen, Plaintiff-in-Error, 215 Montague Street, Brooklyn, N. Y.

41 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of said Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated New York March 29th, 1917.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

42 [Endorsed:] 868/25698. United States Circuit Court of Appeals, Second Circuit. Theodore S. Rosen & Abraham Wagner v. United States. Return to Certiorari.

43 [Endorsed:] File No. 25,698. Supreme Court U. S., October Term, 1916. Term No. 868. Theodore S. Rosen et al., Petitioner, vs. The United States. Writ of Certiorari and return. Filed April 3, 1917.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 438.

VICTOR PAKAS, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 12, 1917.
CERTIORARI AND RETURN FILED MAY 11, 1917.

(25,819)

(25,819)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 438.

VICTOR PAKAS, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print
Transcript of record from the District Court of the United States for the Eastern District of New York	1	1
Petition for writ of error	1	1
Order allowing writ of error	3	2
Writ of error	4	3
Indictment	6	3
Endorsements on indictment	7	4
Assignment of errors	10	5
Citation	12	6
Bill of exceptions	13	7
Testimony of Philip J. Murphy	14	7
Samuel Broder	14	8
John A. Holzopfel	52	29
Jacob Falk	56	31
Morris Furman	62	35
Max Falk	63	35

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 3, 1915.

	Original.	Print
Testimony of Archibald Ireland	64	36
Francis E. McCall	66	37
Celia Flaum	69	39
Nathan Light	70	40
Joseph Crowley	72	41
Edward T. Curran	72	41
Victor Pakas	74	42
John H. Cotter	102	59
Charles B. Milbank	103	59
Jacob Wolf	105	60
David A. Trier	106	61
Paul Moss	106	61
Charge of the court	107	62
Request to charge and exceptions	111	63
Government's Exhibit 1 *a*—Check to American Garter Co., $22.65	113	65
1 *b*—Check to Model Underwear Co., $15.56	114	65
1 *c*—Check to S. Fried, $24.74	115	66
2—Check to M. Furman & Co., $690.80	115	66
3—Check to M. Furman & Co., $107.10	116	67
4—Check to Union Pleating Works, $10.85	117	67
5—Check to Monarch Spec. Co., $312.05	117	68
6—Check to Clover Hat Co., $24.30	118	68
7—Check to Monarch Spec. Co., $79.40	119	69
Defendant's Exhibit A—Certificate of conviction of Samuel Broder	120	69
Stipulation as to case	121	70
Clerk's certificate	122	71
Judge's certificate to settled case and bill of exceptions	122	71
Opinion, Rogers, J.	123	71
Judgment	133	77
Clerk's certificate	135	77
Writ of certiorari and return	136	77

1 *Petition for Allowance of Writ of Error.*

United States District Court, Eastern District of New York.

UNITED STATES OF AMERICA

against

VICTOR PAKAS, Defendant.

To the Honorable Judges of the District Court of the United States for the Second Circuit in and for the Eastern District of New York:

The Petition of Victor Pakas, respectfully shows:

First. That by virtue of a verdict of guilty rendered on the 22nd day of June, 1916, after a trial before the Honorable Harland B. Howe and a jury, the said Victor Pakas was sentenced by the Court on the said 22nd day of June, 1916, to be imprisoned for a term of one year and one day in the United States Penitentiary at Atlanta, Georgia.

Second. That said conviction was had upon the trial of an indictment charging him with the violation of Section 194 of the Criminal Code of the United States.

Third. That upon the trial of the said action and conviction of the said defendant, manifest error has happened to the great
2 damage of the said defendant, the error of which the defendant complains being mainly confined to the question of the competency of one Samuel Broder, who had previously been convicted of a felony, to wit, forgery, and whose incompetency as a witness was urged upon the trial, and upon whose testimony the case of the government depended; and also to the refusal of the Court to grant the motion made by the defendant to dismiss the indictment and take the case away from the jury or to direct a verdict of acquittal upon the ground that the box or place from which the mail matter in question was taken was not an authorized depositary for the mail and upon the further ground that upon the whole case it appeared that the theft in question had occurred after the mail matter in question had left the possession of the government.

Wherefore, your petitioner feeling himself aggrieved by said conviction and sentence, appeals to the Circuit Court of Appeals of the United States in and for the Second Circuit, and prays for the allowance of a writ of error, and that a transcript of so much of the trial as is necessary to present the exceptions presented, together

with the orders and proceedings thereunder, may be transmitted to the Circuit Court of Appeals for review therein.

Dated, New York, June 22nd, 1916.

OLCOTT, GRUBER, BONYNGE & McMANUS,
Attorneys for Victor Pakas, Plaintiff-in-error.

Writ of error allowed.

HARLAND B. HOWE,
District Judge of the United States in the Second Circuit.

3 *Order Allowing Writ.*

At a Stated Term of the United States District Court for the Eastern District of New York, Held at the Post-office Building, in the Borough of Brooklyn, City of New York, on the 22nd Day of June, 1916.

Present: Hon. Harland B. Howe, United States District Judge.

VICTOR PAKAS, Plaintiff-in-error,

against

UNITED STATES OF AMERICA, Defendant-in-error.

Upon motion of Olcott, Gruber, Bonynge & McManus, attorneys for the plaintiff-in-error, and upon filing a petition for a writ of error, it is

Ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Second Circuit, the judgment heretofore entered herein, and that it is further

Ordered, that such writ shall operate as a supersedeas and suspend and operate as a stay of proceedings in this Court, and that the plaintiff-in-error be admitted to bail upon giving a bond in the sum of $3000.00 with sufficient sureties, pending this appeal

4 and conditioned that the said plaintiff-in-error shall abide the judgment of the Circuit Court of Appeals therein and surrender themselves into this Court when required by this Court or at the determination of said appeal; and that it is further

Ordered that the plaintiff-in-error may have 30 days within which to make and serve and file his proposed case and exceptions herein, and the June Term, 1916, is hereby extended 30 days from date during which time the plaintiff-in-error may file amended assignments of error, nunc pro tunc as of this date.

HARLAND B. HOWE,
U. S. D. J.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Eastern District of New York, Greetings:

Because in the record and proceedings, as also in the verdict of the jury and the judgment entered thereon before you or some of you between Victor Pakas, the plaintiff-in-error, and the United States, the defendant-in-error, a manifest error hath happened, to the great damage of the said Victor Pakas, as is said and appears by the complaint: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice
5 be done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the court room of said court in the Post office Building in the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 21st day of July, 1916; that the records and proceedings aforesaid being inspected, the said Judges of the Circuit Court of Appeals may cause further to be done therein, to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness, Honorable Harland B. Howe, United States District Judge, this 22nd day of June, in the year of our Lord, one thousand nine hundred and sixteen.

PERCY G. B. GILKES,
Clerk of the District Court of the
Eastern District of New York,
By J. G. COCHRAN, *Deputy Clerk.*

The foregoing writ is hereby allowed.

HARLAND B. HOWE,
U. S. D. J.

6 *Indictment.*

District Court of the United States of America for the Eastern District of New York.

At a stated term of the District Court of the United States of America, for the Eastern District of New York, begun and held in the Borough of Brooklyn, City of New York, within and for the District aforesaid, on the sixth day of October, in the year of our Lord one thousand nine hundred and fifteen, and continued by adjournment to and including the ninth day of November, in the year of our Lord one thousand nine hundred and fifteen.

EASTERN DISTRICT OF NEW YORK, *ss:*

The Grand Jurors of the United States of America, within and for the district aforesaid, on their oaths present that

Victor Pakas and Samuel Broder each of them late of the Borough of Brooklyn, County of Kings, State and Eastern District of New York, heretofore, to wit: on various times between the thirtieth day of August, nineteen hundred and fifteen, and the twentieth day of September, nineteen hundred and fifteen, at the Borough of Brooklyn, County of Kings, State and Eastern District of New York, and within the jurisdiction of this Court, did knowingly, willfully, unlawfully and felonious-y buy, receive and aid in buying and receiving three certain checks, to wit: check number 3275 drawn by Francis T. White Hardware Co., to the order of Union Peating Co., in the sum of ten and 65/100 dollars on the 13th day of September, 1915; check number 499 drawn by one Chas. D. Levy

7 to the order of Clover Hat Co., on September 15, 1915, in the sum of twenty-four and 30/100 dollars; and check number 91023 drawn by F. R. Arnold & Co., to the order of Monarch Specialty Mfg. Co., on September 17, 1915, in the sum of seventy-nine and 40/100 dollars which had theretofore been unlawfully stolen, taken, embezzled and abstracted from certain mail matter which had theretofore been deposited in the mails of the United States for mailing and delivery by the post office establishment of the United States, each of them, the said Victor Pakas and Samuel Broder, then and there, knowing the same to have been so stolen, taken, embezzled and abstracted as aforesaid against the peace and dignity of the United States of America, and contrary to the form of the statute of the United States in such cases made and provided.

MELVILLE J. FRANCE,
United States Attorney for the
Eastern District of New York.

Endorsements on Indictment.

Feb. 21, 1916.

Deft. Broder, arraigned, plea not guilty, bail fixed at $5,000.00 and case adjourned to April 5th, 1916. Deft. Broder remanded.

February 28, 1916.

Cancelled, defts. present. Deft. Broder remanded to Nassau County Jail at Mineola, L. I. until April 5, 1916, term. Both defts. to appear.

8 April 5, 1916.

Cancelled, defts. present. Deft. Pakas arraigned, plea not guilty entered. Case adjourned to and defts. ordered to be in Court on June 7, 1916.

June 7, 1916.

Cancelled, defts. present, case adjourned to and deft. ordered to return June 12, 1916.

June 12, 1916.

Case called, defts. present, case adjourned and defts. ordered to return June 16, 1916.

June 16, 1916.

Case called, defts. not present, defaults noted.

June 21, 1916.

Before Judge Chatfield. Deft. Broder arraigned. Withdrawn plea of not guilty and pleaded guilty, and ordered the indictment served and June term 1916, extended until deft. is sentenced. Deft. remanded for sentence.

Before Judge Howe.

Case as to Pakas called, deft. Pakas present. His indictment consolidated with No. 1672 and trial of Pakas on consolidated indictment ordered. Trial begun and suspended until June 22, 1916.

June 22, 1916, before Judge Howe.

Trial of Pakas resumed and concluded, verdict of guilty. Motion to set aside verdict, &c., denied. U. S. attorney moved sentence. Deft. Pakas sentenced to imprisonment for one year and one day and each count of the indictments to run concurrently, in U. S. Pentitentiary, at Atlanta, Ga. Order entered for sustenance of jurors. Bail on appeal fixed at $3,000.00. Petition and as-
9 signment of errors filed. Order entered allowing writ and extending June term, 1916, thirty days from this date. Writ of error issued. Writ of error and citation filed.

July 3, 1916, before Chatfield, J.

Cancelled. Deft. Broder present, case adjourned to deft. Broder, remanded to and June term, 1916, extended to July 10, 1916.

July 5, 1916.

Case called before Chatfield J. Deft. Pakas present, pursuant to bail bond, ordered to return Oct. 4, 1916, at 10.30 A. M. June and July terms, 1916, extended to October 4, 1916. New bail bond filed by Pakas.

July 10, 1916.

Deft. Broder. U. S. attorney moves sentence. Deft. Broder sentenced to be imprisoned for 21 days in City Prison at Brooklyn, New York.

Writ of Commitment issued for Broder.

Writ of Commitment for Broder returned & filed.

July 19, 1916.

Order entered extending June term to August 14, 1916, as to Pakas.

Order entered extending June term to September 18, 1916, as to Pakas.

10 *Assignment of Errors.*

United States District Court, Eastern District of New York.

UNITED STATES OF AMERICA, Plaintiff,
against
VICTOR PAKAS, Defendant.

And now comes the plaintiff in error, Victor Pakas, by Olcott, Gruber, Bonynge & McManus, his attorneys, and makes and files the following assignment of errors:

First. One Samuel Broder was called as a witness for the Government, and objection was taken to his competency as such witness on the ground that it appeared from Exhibit A, which was then marked in evidence, that the said Samuel Broder had previously been convicted and sentenced for a felony, to wit: forgery in the second degree. The objection was thereupon overruled by the Court, and exception duly noted.

Second. From the testimony of Samuel Broder, it subsequently appeared by his own admission that he had been previously convicted and sentenced for a felony, to wit: forgery in the second degree; but the objection to his competency was overruled, and exception duly noted.

Third. At the close of the prosecution's case, a motion was made to dismiss the indictment and direct a verdict of acquittal, upon
11 the ground set forth in the motion, as appears from the record, and that the denial of the defendant's motion was error.

Fourth. At the close of the entire case, a motion was made to dismiss the indictment and direct a verdict of acquittal, upon the ground set forth in the motion, as appears from the record, and in that with the testimony of Samuel Broder eliminated, no crime had been proven against said Victor Pakas, and that the denial of the defendant's motion, was error.

Fifth. Upon the rendition of the verdict by the jury, a motion was made to set aside the verdict upon the ground, among others, that the testimony of the said Samuel Broder was incompetent and improperly received, because of his previous conviction for a felony, and that with the testimony of Samuel Broder eliminated, no crime had been proven against said Victor Pakas, and that the denial of the defendant's motion, was error.

Sixth. At the close of the entire case, a motion was made to dismiss the indictment and take the case from the jury, or to direct a verdict of acquittal, upon the ground that the box or place from which the mail matter in question was taken was not an authorized depositary for the mail and upon the further ground that upon the whole case it appeared that the theft in question had occurred after the mail matter in question had left the possession of the Government, and that the denial of the said motion was error.

OLCOTT, GRUBER, BONYNGE & McMANUS,
Attorneys for Victor Pakas, Plaintiff-in-Error.

12 *Citation.*

By the Honorable Harland B. Howe, one of the District Judges, Sitting in the District Court of the United States for the Eastern District of New York, in the Second Circuit.

To the United States of America:

You are hereby cited an amonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit to be

holden at the Borough of Manhattan in the City of New York, on the 21st day of July, 1916, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Eastern District of New York, wherein Victor Pakas is plaintiff-in-error, and the United States of America is defendant-in-error to show cause, if any there be, why the error in said judgment mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Brooklyn, in the City of New York, in the District and Circuit above named, this 22nd day of June, in the year of our Lord, one thousand nine hundred and sixteen.

HARLAND B. HOWE,
U. S. D. J.

13 *Bill of Exceptions.*

United States District Court, Eastern District of New York.

THE UNITED STATES OF AMERICA

against

VICTOR PAKAS.

Brooklyn, N. Y.,
June 21, 1916.

Before Hon. Harland D. Howe, District Judge and a jury.
12:00 o'clock noon.
Case called. Ready.
Jury drawn and examined; satisfactory to both sides and sworn.
Trial commenced.

Appearances:

Melville J. France, Esq., U. S. Attorney.
Henry Ward Beer, Esq., Assistant U. S. Attorney.
Terence J. McManus, Esq., Attorney for defendant.

14 PHILIP J. MURPHY, called as a witness on behalf of the Government and being duly sworn, testifies as follows:

Direct examination.

By Mr. Beer:

I am attached to the New York City Police force.
Q. I point out to you this boy sitting over here, Broder, and ask you if you ever saw that boy before?
A. I did. I searched Broder at that time. I found on him three

checks. These are the checks. I never saw the defendant Pakas. I never had a conversation with him or never talked with him .

(The three checks previously shown to witness are marked Exhibit One for Identification.)

SAMUEL BRODER, called as a witness on behalf of the Government and being duly sworn, testifies as follows:

Direct examination.

By Mr. Beer:

Q. You are charged by the United States Government with having unlawfully stolen checks from the United States mail, received them, and you pleaded guilty?

A. Yes.

Mr. McManus: I object to that, and ask that the answer be stricken out at this time.

Mr. McManus: On the opening statement of the district attorney to the effect that this witness had previously been tried and
15 convicted of the crime of forgery, and upon the fact that I have here——

The Court: All this having been gone over in another case, as I understand it, can't you put on the record the statement of the facts which would be satisfactory to the Government and to the defendant, and then we can dispose of it?

By the Court: Yes.

Mr. McManus: Will it be conceded by the Government that heretofore and on the 28th day of January, 1914, Samuel Broder, the witness now on the stand, was convicted of the crime of forgery in the second degree in the Court of General Sessions in the County of New York?

By Mr. Beer: I will concede that.

By Mr. McManus: And that thereupon sentence was imposed by Judge Charles C. Nott, Jr., of the Court of General Sessions, sentencing the defendant to imprisonment in the New York State Reformatory at Elmira?

By Mr. Beer: I will concede that.

By Mr. McManus: And that this defendant thereafter served a sentence of imprisonment on the charge of forgery, on which he had been convicted, in Reformatory at Elmira?

Cross-examination.

By Mr. McManus:

I was sentenced to Elmira? I think January 28, 1914.

The charge of forgery for which I had been convicted was
16 for forging a check. Only one check.

I pleaded guilty.

Q. And for how long were you sentenced in the Elmira Reformatory?

A. Twelve months and twenty days or thirteen months twenty. And then I was left out after that. On parole.

Q. And what was the amount of the check that you forged at that time?

A. I think it was $125, but I didn't get the money.

Q. You did not get the money, but you forged the check.

A. Yes. I pleaded guilty to it.

Mr. McManus: In connection with this testimony, and with my motion, I offer a certificate showing the conviction by the Court of General Sessions of the County of New York.

By the Court: It is admitted, and marked defendant's exhibit A.

By Mr. McManus: I object if the Court please, to this witness testifying upon the ground that this witness is incompetent to testify because of the admissions which have thus far been placed upon the record. The defendant has pleaded guilty to the crime of forgery in the second degree. The crime of forgery under the Common Law was an infamous crime, and in the case of United States against Maxcey in 207 Federal Reporter, with which your Honor is entirely familiar—(further argument on the motion not reported.)

By the Court: The practice of this Court as I am advised, is that I should follow the decision already made in another case,
17 and I think that would be the better practice, so you may enter Mr. Reporter, without expressing my own view as to the legal question involved, and solely for the purpose of this case, the Court will overrule these objections, because of some question which has been considered by Judge Chatfield, and the case having gone up to the Court of Appeals from his decision for the purpose of testing and having the law settled on these objections, I will admit the evidence and reserve an exception to the defendant, and this will apply to all the testimony given by this witness without further objection or exception. That will take care of the right of the defendant. You see gentlemen this same question having come up before, and having been passed on by the Court here when another Judge was sitting, the better practice is to follow that, otherwise it would throw a good deal of confusion in the conduct of business if every Judge came along and thought a different rule should apply. The question of having gone up to the Court of Appeals and is to be decided there, I think for the purpose of this case we will admit the evidence.

Examination.

By Mr. Beer (resumed):

I know the defendant Pakas seated here.

Q. Will you tell us when you first became acquainted with him, and under what circumstances?

A. It was on Friday night I think in the last part of June.
18 In 1915, I was working at that time with J. W. Reid, that was after I came out of Elmira, and Mr. Reid sent me with a piece of goods to Wagner.

Wagner was in a tailor shop at 250 Broadway, Brooklyn, N. Y.

It was in Wagner's tailor shop that I first met Pakas.

Q. Will you tell us the first conversation that you had with Pakas, and under what circumstances?

A. It was on Friday night. Being there before Pakas, and he told me to come in again. I told him I would leave Reid. On Friday night I went to Mr. Wagner for a piece of goods.

Q. Just tell us that you are in the store, and never mind what you were in there for, but you were in Wagner's store and Pakas was there, now was there a conversation had between you and Pakas or between Wagner and Pakas, tell us what conversation it was in the presence of Pakas?

A. Pakas, Mr. Wagner and myself. I came into the store and Wagner told me take Pakas' measure and make a design of it. I took his measure and made a drawing. It was satisfactory and he employed me at six dollars a week.

After Mr. Wagner; that was the first time I met Mr. Pakas.

I saw Mr. Pakas after that.

Q. Who were you working for then?

A. I was only working one week for Mr. Wagner and then he says, he hasn't got no work and I went away.

I saw Pakas again when I left Mr. Wagner's employ, he told me I could come any time I wanted.

19 I used to come in to Mr. Wagner's very often, because I used to give checks there, and some times I used to be there twice or three times a week and see Mr. Pakas. He was even there once on a Saturday night, and a fountain pen of mine was stolen from my pocket, and Mr. Pakas was there.

I don't want to accuse Pakas of stealing that fountain men.

Q. Tell us what conversation you had that Saturday night if you had any with Pakas?

A. With Pakas we used to speak about the tailoring business. It was about September 12th, Sunday afternoon, 1915, while I was in Wagner's store, Mr. Pakas came, and he was worried. Mr. Wagner asked him what is the matter, and he told him there is a mortgage that is being foreclosed, because he has got to pay eighteen hundred dollars and he hasn't got it. He started to cry. Wagner said, don't worry about that, Sammy will help you out. I says, now listen Wagner, and he started to tell him what I was doing, because he was getting checks.

Q. Never mind about starting to tell about getting checks, just tell us what Wagner told Pakas after Pakas told him he had to have money and started to cry?

A. Wagner said to Pakas, while in my presence, don't worry Sam will help you out. I said to Wagner, shut up, too many men know already you are getting checks off me. He said, Pakas is a friend of mine. Help him out. Give him checks. So, he started and told Mr. Pakas about the checks stolen in the mail from letter boxes by me, and Wagner and Rosen working with me and I gave them

20 the checks on a fifty fifty bases, and Pakas should also take checks and pay his mortgage with it, and he will pay me just

the same as he did, but he only promised me one hundred dollars, a suit of clothes and an overcoat.

Q. That was for the eighteen hundred dollars' worth of checks you were to give him?

A. Two thousand dollars' worth of checks. And, Pakas told me, he says, well won't you help me out. Won't you give me some checks? What can I do for you, I am deep in trouble enough, leave me alone. But, he says, Wagner said it is all right to help him out, and Wagner told him that the checks were stolen from the mail, and that the checks were taken out and the endorsements were forgery, and the checks are good, but they are liable to come back in a year, eight months, four months or sometime, but the checks were all good. They pass the bank. So, Pakas says, I am satisfied to take anything, if I can help myself. I will do anything. I have a five dollar check in my pocket which I gave him in Wagner's store, then I had a seventy-five dollar check in my house. I lived at that time on 10th Street, New York City, and he rode over with me in the same car to New York to my house. I went up to the house and brought down a seventy-five dollar check. It was dated, I think—Joseph Zerweck check, seventy-five dollars, and I gave him that check, and he went away. I told him tomorrow morning you want two thousand dollars of checks, I may be able to get it for you, if there will be enough mail in the letter boxes.

Q. This was on the Monday following Saturday night?

A. The following Sunday afternoon which I gave him the
21 five dollars and seventy-five dollar check. About nine o'clock I stole some checks from M. Furman & Company at 136 Green Street, New York City; altogether I stole there from Furman & Company, quite many, about fifteen checks, may be more.

Q. I show you this check and ask you if this is one of the checks that you stole from Furman & Company on the 13th? (Exhibit 2.)

A. Yes, sir, that check and there was also a twelve hundred dollar check and a one hundred and seven dollar check with the same in the mail which I stole that check.

Q. I show you this check and ask you if this — a check that you stole on that day? (Exhibit 3.)

(Question repeated.) Where did you steal them from?

A. From M. Furman & Company, 136 Greene Street, New York City.

Out of the letter box with a bunch of mail.

There was a United States stamp on the envelope that this came in.

That writing on the back is my writing.

That "M. Furman & Company," the top signature; that was the forged part, in the presence of Mr. Pakas.

I did steal other checks that day.

By Mr. Beer: I offer this in evidence.

By Mr. McManus: Before that is passed upon by your Honor, I desire to question this witness on the particular place where he got this check from.

By the Court: Suppose we let them all go in now, and then you can cross-examine and I will rule on your objection.

22 Q. Now you say that you stole other checks that day out of letter boxes, what are the amounts of these checks?

A. Well, on this morning of September 13th, I stole a bunch of mail and brought *in* up in Pakas' office, 303 Fifth Avenue, New York City, I took up a bunch of mail and went in Mr. Pakas' presence.

By the Court: That is this day?

The Witness: Yes.

A. (Continuing:) I took out whatever was checks, and I went to his desk and I forged the endorsements and gave to Mr. Pakas. I did not give all of them, but he wanted two thousand dollars. I gave him a twelve hundred dollar check, a $126 check, a $660 check, a $107 check, and a little amount, about fifteen or sixteen dollar check, and the rest of them I gave to the other party.

By the Court: Who did you give the others to?

The Witness: Mr. Rose and Wagner; they were convicted here last January.

By Mr. McManus: I object to that as not binding on this defendant in any way.

By Mr. Beer: I consent that be stricken out, of course. I most anxiously would like to see that go in evidence. He says he stole that bunch of checks and gave certain ones to the defendant, what did he do with others.

By Mr. McManus: That is not competent as against this defendant.

23 By the Court: He can tell what he did with these checks. He gave some to this man and some to others.

By Mr. McManus: I except to your Honor's observation on the point and to admitting that answer.

By the Court: Bear in mind gentlemen what I said about that and note an exception to the defendant.

I did give him other checks on other occasions. I came up the following morning; that was on Tuesday, and he told me that a check for $660——

Q. I show you that check, Broder, and ask you (exhibit 7 for identification) where did you get that check from?

A. That was stolen from the regular box of the United States Mail.

Q. Where at?

A. In that section; down town section; I think it was Broome Street, I think. I think it was in Broome Street. That was given to Mr. Pakas about September 19th.

Q. Did you say that was in a letter when you brought it up to Pakas' store and opened it in his place?

A. Yes and signed with his pen at his desk.

Q. And you forged it in his presence?

A. I did.

By Mr. McManus: I object to his leading this witness.

Q. I show you Government's exhibit 3 for identification and ask you where you saw that first and under what circumstances?

A. That check was stolen at the same time where I stole the $660 check and the $1,200 check and brought over to Mr. Pakas'
24 office in an envelope with a stamp and the United States Mail and signed with the pen in Mr. Pakas' office; the endorsement was forged in his office.

Q. And you forged the endorsement on the back of it?

A. Yes.

By the Court: Did Pakas know about them being forged there in his office?

The Witness: Yes, he seen me.

Q. I show you this, Government's exhibit 4 for identification, and ask you where you saw that and under what circumstances?

A. That was also stolen in the United States Mail.

By Mr. McManus: I ask that be stricken out as conclusion.

By the Court: He did say he stole them.

Q. Did you steal them?

A. I stole them out of those letter boxes with the mail and brought up to Mr. Pakas' office. I opened it in his office and forged the endorsements with his pen and gave to Pakas.

By the Court: Did he know where you got the check and forged the endorsements on them?

The Witness: Yes, your Honor.

Q. Now, I show you Government's exhibit 5 for identification and ask you to tell the gentlemen of the jury and the Court where you first saw that and under what circumstances?

A. Well, I stole mail out of letter boxes, in the United States
25 mail and brought the letter to Mr. Pakas' office and I took his fountain pen, his pen on the desk, and forged the endorsements there.

Q. Was Pakas there at the time?

A. He was there because I was at the desk and he was near me. He even remarked to me once in case I get a check in the mail, and if somebody steals it, I can have the same thing as you do to the other man's mail.

Q. Now, I show you this check, a check of Samstag and Hilder Brothers of $312, marked Government's exhibit 6 for identification, and ask you to tell us if you received that check?

A. Yes, that check was stolen from Broome Street and while in the letter. I opened it in Mr. Pakas' presence in his office 303 Fifth Avenue, and forged with his pen in the desk while Mr. Pakas was present.

Q. Now, all these checks are forgeries, the endorsements on the back all forgeries?

A. I forged the name of the payee.

1:00 p. m. recess for luncheon until 2:00 p. m.

2:30 p. m. Met pursuant to adjournment.

Direct examination continued.

By Mr. Beer:

Q. I recall you said it was the thirteenth of September, or on a Monday, I don't recall the exact date, that you went to Pakas and gave him some checks that you had stolen from the mail box of Furman and Company, M. Furman and Company?

A. Yes.

Q. Will you take out from these exhibits the checks you gave him on that Monday?

26 By Mr. McManus: I object to questioning him about a paper not yet in evidence.

By the Court: What was the question?

By Mr. Beer: I asked him which of these he gave Pakas on that Monday morning.

By the Court: I will allow that.

By Mr. McManus: Exception.

A. These two checks and another $1,260., which is not here.

Q. Are you sure that was $1,260.?

A. I am not sure about the exact amount of sixty, but I am sure it was a little over twelve hundred dollars.

I went to him again after that with other checks, after that Monday.

I went to him the Tuesday following. Yes, on the following morning after Monday, Tuesday morning, I went to Pakas' place again and had a bunch of mail in my pocket which I stole from letter boxes, and I opened the letters, in which letters there were orders I used to make out envelopes and send them back where they came from, and the checks I kept.

Q. When a letter contained an order you would take the check out and send the order back to the firm, that right?

A. No, sir.

Q. What was the next day you came to him with more checks?

A. I brought him checks nearly every day, until about September twentieth.

I can't recall how many checks I gave him altogether. I can't recall the exact amount, but I think it was over fifteen, varying in amounts from five dollars up to twelve hundred dollars.

27 Q. Did you have a conversation with Pakas on the Tuesday—you say you went there every day?

A. Yes.

Q. What conversation did you have with him on Tuesday?

A. On the following day when I came with the $660. and the $1,200 and the $107. checks, I came the next morning and I gave them more checks, and he says "I gave the $660 and the $1,200 check to my lawyer for the lawyer who had the mortgage

Q. Did he mention the lawyer's name?

A. I think he did mention it but I cannot recollect. It was situated not far from Wagner, about two buildings away.

Q. Where Wagner had his tailor shop?

A. Yes. So he says the lawyer presented the checks for collection, and he wanted the money right away of the bank. The bank didn't want to give him the money, but wanted to leave the checks for collection. He didn't. He endorsed the name, the lawyer, and crossed it off, and also notified Mrs. Pakas, because when he took the checks he gave him the receipt, he notified Mrs. Pakas she should give the receipt and take back the checks. Tuesday he said he had to go to the lawyer and get the checks back.

Q. The checks you gave him Monday?

A. $660. and $1,200., which the bank didn't want to give the money, and he gave him the receipt. I went back in the afternoon, he told me he got back the checks. He said the $1,200 I can't cash no more, the lawyer endorsement scratched it up. Pakas tore it up and threw it in a spit-oon. He said, "No use, you can't cash it." I said "What are you going to do with the $660. check?" He said "I will cash with the people I am dealing with, I owe some money."

28 Q. Did you give him checks Tuesday?

A. I did, because I agreed to give him $2,000.00 checks. I had to get $100 and a suit of clothes and an overcoat.

Q. Do you recall the amounts of the checks that you gave him Tuesday?

Mr. McManus: I object, the paper speaks for itself.

The Court: I will allow that.

A. It was about $82. or $84. or something. One was $79.40, and one was some more.

Q. Look at these and see if you recall giving him these checks?

A. That I gave him later.

The Court: What is that.

Mr. Beer: For identification Exhibit 7.

Q. Look at those and tell us if you remember giving him any of those checks that Tuesday?

Mr. McManus: I object to using papers not in evidence; testifying from papers not in evidence.

The Court: Admitted.

Mr. McManus: Exception.

A. I think this check $212.

The Court: What is the number?

Mr. Beer: Government's Exhibit 6 for Identification.

Q. After that did you give him any other checks?

A. Yes.

29 Q. I show you these and ask you to tell the gentlemen of the jury if you can recognize these?

The Court: You want to refer to them.
Mr. Beer: I will later.
The Court: You want to do it now. That will be too late.
Mr. McManus: I object on the same ground.

Q. I show you then Government's Exhibit 5 for identification, 5 for identification.

Mr. McManus: I object on the same ground.
The Court: Admitted.
Mr. McManus: It may be that these checks, after I have an opportunity to cross examine the witness, may not be admitted in evidence.
The Court: Admitted.
Mr. McManus: Exception.

A. This check, Exhibit 5, I gave Pakas after when I was—that was about Thursday—I was up in Pakas' place, and he told me he was in Wagner's store and Rosen came in and told him the detectives are after me, I should get away.
Q. You are holding in your hands Government's Exhibit 5, and you say—tell it to us again?
A. Exhibit 5, that check. I came out, that was Thursday morning, I think it was, I am not positive, I came up and he told me he was in Wagner's place and met Rosen there.
30 The Court: Who told you?
A. Pakas told me in his office he met Rosen in Wagner's store, and Rosen told him if he sees me—Rosen knew I gave him checks too—to tell me the detectives were in his place looking for me, and to get away.
Q. That was the same day you gave him that check?
A. Yes, the same day I gave him that check.
Q. Where did you get that check from—when did you give him that check you hold in your hand?
A. Exhibit 4. He is supposed to make me a suit of clothes, and he wanted I should give him ten dollars to buy goods, in fact he selected some goods, picked some samples. I didn't like the goods. He said he will get me some goods. He took the measurement. He said I want to have ten dollars. I said "I wouldn't give you money. You said you would give me one hundred dollars, a suit of clothes and an overcoat." That check was in the mail which I stole. I said "Here's a check $10.85." He said "What's the use checks, I want cash." I said "What did you do with the other checks, you cashed them."
Q. Was anything else said?
A. Nothing about this check. The day after I gave him this check he said "I am too busy." He said "Sam, can't you go to a tailor"—I think he mentioned a tailor Volino—he didn't mention the name, he used to be J. Alpert and Company. He is on Lexington Avenue. "Why don't you order a suit of clothes and buy with bad checks." I said: "You agreed to give me $100 a suit of clothes and an overcoat." He said: "I will give you, but I

31 am too busy." He said: "Go over and give it and I will make you a suit afterwards." I went to a tailor and gave his a fictitious name.

Q. What name did you give Volina?

A. Samuel Greenburg.

Q. Did you have a conversation with Pakas about ordering this suit on bad checks from Volina?

A. As soon as I ordered the suit of clothes when Volina took my measure, Samuel Greenburg gave my name, at Pakas, and any time he wanted me call Pakas' phone. As soon as I went from Volina's shop I went to Pakas and said I am ordering a suit, the name is Samuel Greenburg. In case anybody calls for Greenburg you know that's me, and tell him I will be up there soon, and I will come over.

Q. Were you there any time that Volina came in and asked for Greenburg?

A. Many times he telephoned.

Mr. McManus: I object and ask it be stri-ken out. That is a conclusion of the witness. He has not testified he was on the telephone or knew who was telephoning into the place.

Mr. Beer: He said a man named Volina telephoned.

The Court: How do you know it was Volina?

The Witness: Because when I came back Pakas told me Volina telephoned and wants to see me.

The Court: That is admissible but what was said over the phone, he could not testify to.

32 I did get this suit of clothes; it was delivered at the store of Pakas under the name of Greenburg.

It was about three days after before I was arrested. The suit of clothes was supposed to be ready at three o'clock. I went myself but it wasn't ready. He said two hours more. He wanted to send to my home. I said, "Send it to Pakas." I waited there two hours and in the mean time I wanted a drink. I went down for a drink and left my hat in Paka's.

Q. You didn't go to a bar?

A. No, sir; I went downstairs for water. There was no water. When I came back up Pakas was measuring a customer, and I seen Volina's son was sitting, has a suit of clothes. As soon as I came in Pakas remarked, "Here is Greenburg." He gave me the suit of clothes and in Pakas' place I had a quarter in my pocket and I gave it to Volina.

Q. What did you do after you got the suit of clothes, leave Paka's?

A. No. I had an appointment to see a cousin of mine. Pakas said to me, "Try on the suit of clothes and see how it fits." He said, "He butchered it up. The collar is out of order, I will fix it." I said, "No, you got to give me $100 a suit of clothes and an overcoat."

I seen Pakas again after that in his place of business.

The conversation I had with him the next time I saw him he said, "You say you will give me $2,000 worth of checks." I says, "I

gave you more." "I gave you $1,200, $600 and some $170, and more checks I gave you. More than you wanted." He said, "I cannot cash big amounts, give me small amounts." I said,
33 "Rosen wants big checks, you want small checks." I said, "I can't steal so many checks."

Q. After that did you give him any other checks?

A. About two days before I was arrested, Monday, one day before I was arrested, I think I gave him one check, that was for $175 or $165.

Q. Where did you steal that check you gave him?

A. Down town.

I operated in lower New York, Green, Crosby, Chambers, downtown factory sections; these letter boxes were located in the hallways; when the letter carrier would come from the mail box I would go and steal it.

After I was arrested I saw Pakas. He came to see me in jail twice. I had a conversation with him the first time he came to jail. That was in Tombs prison, seventh tier.

I was arrested on September 28th, 1915. Officer Murphy arrested me.

Q. Tell us what Pakas said in the Tombs prison the first day he called?

A. I was arrested September 28th, 1915. I took the blame on myself.

Q. When did you take that blame?

A. When Murphy brought me in front of Inspector Jacobs in the Post Office Building, and I wanted to shield him.

Mr. McManus: I ask that be stricken out; the witness' own conclusion.

The Court: I am not inclined to strike it out.

Mr. McManus: Exception.

34 Q. Tell us what you said to Pakas when he came in the jail for the first time.

A. He came in jail and wanted more checks. I said, "How I am in jail and you want more checks. Where the hell do you want me to get checks,"

Q. What did you say to Pakas when he asked you that?

A. I said to Pakas, "It looks very bad for me. I have sent many notes with my cousin to you to get me some money. I have not got a cent, and I want to get a lawyer and help me out, try if you can, because you may be in trouble too, I will try to shield you as much as possible." He said: "What I can do?" He took out a paper and showed me his default upon the mortgage. He started to cry. My cousin was there, I didn't want to tell him anything. I said, "Get me a lawyer."

A cousin of mine, Mrs. Flamm was there at the time.

"Pakas," I said, "leave me some money." He said, "I haven't got it." I said, "Listen, you agreed when I should give you $2,000 in checks, I had to get $100 a suit of clothes and an overcoat." Checks

for Rosen and Wagner I operated I got half and half. I didn't get a cent yet. He took a half a dollar and threw me in the cell.

Q. I show this paper and ask you to tell the gentlemen of the jury when you wrote that, if you did?

A. Saturday, October 17th, while a cousin of mine, Mr. Nathan Light was up to see me.

Q. Tell us when you wrote that letter?

A. That letter I wrote Sunday, October 17th, Tombs prison.

Q. When did you write that letter?

A. September 17th Sunday.

35 I saw Pakas after I wrote that letter. I think up there. I had a conversation with Pakas in regard to that letter I wrote there. I sent my cousin he should get $65 for me.

Q. I want to warn you, don't tell us anything that happened or was said not in the presence of Pakas.

The Court: He says He sent his cousin out.

A. I sent my cousin to Pakas.

Q. What did Pakas say when he came in, did he say anything in regard to that letter and its contents?

A. I said to Pakas, "you promised to get me a lawyer, you, Rosen and Wagner promised to get me a lawyer. I didn't get it. I had to hire a lawyer myself, I need some money to pay the lawyer, I haven't got it. You got me in the trouble, it is your duty to see I am as lenient as possible." I sent my cousin for $65. I didn't seen him. I don't know whether he got it or not. I said, "You want me to suffer everything and you be outside."

Q. When did you see that letter next?

A. I think I seen the letter yesterday in your office.

Q. Did you have further conversation with Pakas after that?

A. He never came up again. He only seen me twice.

By the Court:

Q. What did he say when you told him all this?

A. The first time he came up?

Q. No, the last time?

A. He had a note in his pocket from a bank. He said, "Sam, I think you got some money in the bank." "I got no money,

36 why don't you help me if you got money in the bank, sign this and I will get it." I said, "You know I have no money in the bank and if I had money, I will not send you."

Mr. Beer: Then I offer in evidence Government's Exhibit 2 for identification, 7 for identification, 3 for identification, 5 for identification, 6 for identification, and Exhibit 4 for identification.

Mr. McManus: I desire to cross examine on those.

Q. What did you do with the $1200 check? What was done?

A. As soon as I got it back from the lawyer, $650 and $1200, so the $1200 check, this signature was badly——

The Court: He said he tore it up and threw it in the spittoon.

Q. Who tore it up?
A. Pakas.

Cross-examination.

By Mr. McManus:

I said in answer to the District Attorney that these checks Exhibits 2, 3, 4, 5, and 6, being checks drawn by various persons or corporations to various other persons and corporations I took from boxes; that these boxes were in buildings in the downtown business districts, factory sections, New York. I went into the hallways of the buildings, saw boxes there with the names of the different tenants in the buildings on the boxes, that is right.

Q. And you opened those boxes and those boxes bore the names of the different tenants in these buildings, is that right?

A. Well, some tenants didn't have no locks on them, if
37 they were closed, I didn't have no key. I did not open them. Boxes which I could open I opened up and took out the mail and brought to Pakas' office.

Q. In any event the boxes which you opened were all boxes which were not locked?

A. Some of them.

All of them bore the private name of the person who is the tenant in the building.

Out of these private boxes I took the letters I found there.

I took those letters up to Pakas' place of business.

And the letters were then opened.

Q. That is what you did in every instance with respect to every one of these exhibits, 2 to 7?

A. Some of them, all of them, positively.

In no instance did I ever open a United States mail box on a corner.

I never broke open the mail at all in any way in any of these instances. Only letter boxes.

Q. Only boxes in the building and that bore the name of private mark of tenants in the building?

A. Perhaps there were lots of boxes that had that mark, but I didn't see that. Only stole of letter boxes—

In which the letter carriers would deposit mail.

Mr. McManus: I object. Manifestly these were documents which were not taken from the mail.

Mr. Beer: After delivery had been made.

Mr. McManus: Delivery had been made to the private individual, in every instance.

Mr. Beer: I offer in evidence a letter of the Department making those boxes authorized depositories.

38 Mr. McManus: I take it this statute does not change the situation in any part of it.

The Court: What is that?

Mr. Beer: An order of the Post Office Department dated February

24th, 1915, saying that the within is a copy of the original order No. 8571, issued by the Post Office Department, and the language being: "Any letter box or other receptacle intended or used for the receipt or delivery of mail matter on any city delivery route, rural delivery route, star route, or other mail route, is hereby designated a letter box for the receipt or delivery of mail matter within the meaning of the Act of March 4, 1909."

Mr. McManus: If the court pleases, I desire to call your attention to one or two cases on this question: This very question as to mail passing out of the control of the Government has been raised in a number of cases, and there is one case to which I will refer.

The Court: Did you have these same Objections in the other case?

Mr. Beer: Yes.

Mr. McManus: In United States against Safford, 66 Federal, 942, and United States against Lee. In one of these cases the mail was taken from the desk of a person to whom the mail had been delivered by the postmaster. The mail had not been opened, and it was held that was an offense which was subject to the jurisdiction of the State law and not the Federal law. The larceny in this situation
39 on this state of facts, and the offense with which the defendant should be charged, is an offense under the State law.

The Court: What section is this indictment drawn under.

Mr. McManus: 194 of the Penal Code, which says: "* * * or shall abstract or remove from any such letter, or shall secrete, embezzle, or destroy any such letter, or whoever shall buy, receive or conceal, or aid in buying, receiving, or concealing any letter, etc."

The Court: If, having made an order that this box was arranged for the postman to leave the mail in, wouldn't that be within the meaning of that statute.

Mr. McManus: I don't think so.

The Court: You refer back to that language.

Mr. McManus: I think that would be taking it from a private depository.

The Court: The postal department has made an order that such boxes are part of the system.

Mr. McManus: I don't think that is the sense of it. I think that statute covers the situation for example on rural free delivery route where the Government supervises the construction and points out the various routes. That is the purpose.

The Court: According to that order I would take it that would be a delivery to the person just the same as if delivery in the office.

Mr. McManus: Once a letter man has delivered a letter
40 into that receptacle it passes from the control of the Government. They cannot go in and take the letter from that box. They have not the keys or control of it. The only person who has jurisdiction over it is the private individual.

The Court: Did you read all of that order.

Mr. Beer: This question was raised, and this order was made to cover cases of this kind because the Government had on appeal lost several cases simply because the Court did not hold that way, and

the order was made in order to protect the boxes, that they are authorized depositories of mail.

Mr. McManus: There are distinctions. That applies to the building, and those are official depositories of the United States Government, while in the instance here recited it is the private box of the individual.

The Court: That is pretty broad language. "Any letter box or other receptacle intended or used for the receipt or delivery of mail matter on any city delivery route, rural delivery route, star route, or other mail route, is hereby designated a letter box for the receipt or delivery of mail matter within the meaning of the Act of March 4, 1909, Section 198."

Mr. McManus: Section 194.

The Court: I am inclined to mark this order in evidence. I am inclined to hold against you.

41 Mr. McManus: I have to obey your Honor's ruling, and respect*ab*-ly except.

The Court: Yes, exception.

The Witness: I have forgot to state——

Q. What is that?

A. While I was in Pakas' office about three days after he gave the $660 check to collect from a man he does business, three days later while I was in Pakas' office Pakas told me the man he gave the $660 check to said he should produce the man who endorsed the signature M. Furman, and Pakas could not produce that man and said the man is in Philadelphia. Pakas told me, and he said, "What will we do?" I said, "What can we do." He wanted me to get a man to substitute for him. I said "You do what you want, I gave you checks."

Q. He wanted you to get a man to substitute?

Mr. Beer: I object.

The Court: I don't think you should restate.

Recross-examination.

By Mr. McManus:

I am nineteen years old, twenty.

I have been in this country six and one-half years.

I came here from the other side—Russian Poland.

My parents are not here; over on the other side my mother is alive, my father was killed by soldiers in Russia.

At the time I was convicted I was working one and one-half years at Guttman's, Solomn & Company, 511 Broadway, as imitation diamond setter, stone setter.

42 It was not there I forged the check.

Q. Where was that?

A. A brother of mine was out South.

Q. Where was that?

A. I couldn't answer that I forged the check in the house where I lived.

Q. That check was for $125?

A. I don't know the exact amount but I think it was.
Q. Did you forge any other checks at that time?
A. Can't recollect. I don't know.
Q. Do you mean to say a thing of forging checks is so unimportant you can't tell whether you did it or not?
A. No, sir. I have not, but I remember one instance.
Q. Do you know whether you forged any other checks at the time prior to your first arrest and conviction?
A. I remember while I was in business I sold the chains which I used to manufacture to a man on 8th street and 3rd avenue and 8th street, and he paid with a check. It was $8. I took that check and went in the bank. It was no good. I needed money that time. I couldn't get it so I went to a friend of mine and he cashed me that check, but I afterwards made it good.
Q. You knew when you cashed the check it was not good?
A. I was intention I should make it good.
Q. How many other checks have you forged or got money on that way?
A. Plenty in here.
Q. Before this?
A. Before I went to Elmira?
Q. Yes.
A. Perhaps I had some more. I don't know, I can't recollect.
Q. In other words it is not of much importance to you how many you forged, is that about it?
A. I think it was not more than two.
43 Q. You were 18 when convicted?
A. No, sir, I was 17. I was not convicted but I pleaded guilty January 19th, 1914. I was never in trouble before.
Q. I did not say you had been, did I?
A. I had been in a position before I was convicted about three months, then I was out of work.
In business for myself making chains, hat pins, combs.
My place of business was I think 404 East 6th Street.
Q. Before that you worked at this place on Broadway?
A. And worked in other places. Stacy Brothers.
Q. What was your work generally?
A. Imitation diamond setter.
Q. So you were familiar with business methods?
A. Not very much.
Q. You knew all about checks?
A. Not very much.
I did not have any bank account of my own when in business.
I met the defendant Pakas first in June, 1915, in Brooklyn; Wagner's store.
I was not exactly looking for a job, but I told Wagner two hours earlier in the same day, the man I employed I couldn't stand it. He was J. W. Reid, 475 Broadway, tailor, Brooklyn.
I worked with him three or four weeks after I came from Elmira.
Q. Is that the only place?
A. 99 Lee avenue.

Q. What doing?
A. Tailoring.
Q. Any other jobs?
A. No. Working for Goldstein about four weeks and used to deliver orders from Goldstein to Reid and Reid employed me.
Before I met Wagner in June I had been out of work
44 about seven weeks and in that time I had two jobs.
Q. And you left the second one?
A. I left two jobs, and I have to explain why I left them.
Q. You had two jobs in seven weeks?
A. Counsellor, that is the impression you want to make.

The Court: He did not ask you why you left. He asked if you left.

Q. You had two jobs in seven weeks?
A. Yes, and looking for a third the time I met Wagner.
I simply met Pakas there casually one night in June. Pakas lives in that neighborhood. He used to that time.
Q. You only met him there in the place that time, and in order to see whether you had skill or not they let you measure him for a suit of clothes?
A. They told me.
Q. You knew Pakas was a tailor?
A. I did not know that time.
Later I did.
Q. You didn't see him for some time after?
A. Yes, I saw him often.
Q. He had never anything to do with you?
A. I used to talk with him.
Q. The first talk you had—talk about stealing checks and forging endorsements and turning them over to him, was September?
A. September 12th, 1915, Sunday.
Q. You are positive that was Sunday?
A. I am positive because the day following——
It was over in Wagner's place.
Q. In order to have it clear tell us again what was said about your forging checks and turning checks over to Pakas at that time.

45 Mr. McManus: In order to expedite the time of everybody and enable these witness- to go away, I am willing to concede on behalf of the defendant the checks offered in evidence, Exhibits 2 to 7, the defendant concedes those checks were deposited by the makers in the United States mail.
Mr. Beer: And sent to the people mentioned on the envelopes.
Mr. McManus: And that the envelopes were directed to the people mentioned on the checks.
Mr. Beer: And didn't reach those people.
Mr. McManus: That does not cover this situation. Well, I will concede that. They did not reach the payee of the check at the time specified.

Q. That was Sunday, the 12th?

A. Pakas came in the store and started to cry that they are going to foreclose his mortgage and he does not know what to do. Wagner said, "What are you worrying about?" He said, "Sam, will help you out." I said, "Shut up, I am in dutch enough." He said, "Pakas is a friend of mine." Pakas asked Wagner, Wagner told him everything, I am stealing the mail out of letter boxes, giving the checks to Rosen and Wagner, they are taking checks fifty fifty and they are all going through the bank, they are liable to come back in a year or so but they are all right. I gave him a check for $5 for his wife to cash. I had in my house a check for $75. I think it was pay to Joseph Zerwick.—He went home with me to New York and I gave him the $75 check.

46 Q. That was Sunday, September 12th?

A. Yes.

Q. Is that Joseph Zerwick here?

A. No, missing.

Q. What other checks did you give him?

A. That was the only two checks I gave.

Joseph Zerwick and the other $5.

I don't know who was the maker of that and the payee.

Then he came to my house with me in the house the same day.

He went down and I went up and brought down the check.

Q. You stole them for the other fellows?

A. I didn't steal, for the $10 was too small and the other was ahead check, dated ahead.

I don't know where that is now.

Q. Monday you went out and went into these buildings, other buildings, and stole more checks?

A. I promised Pakas I would give him $2,000 tomorrow morning.

Q. Pakas told you about being in trouble in money, mortgage due?

A. He told it to Wagner. Wagner repeat to me and he told me.

Q. He wanted to raise money in order to prevent the mortgage being foreclosed?

A. He says he doesn't care what way he gets the money he wants to pay.

Monday after I took checks from the mail I took them to Pakas' place, 303 Fifth avenue.

I think 32nd street, corner of 32nd street.

I am positive sure it is 303.

I am not sure of the street. It is 32nd street.

Not positive.

I went there a great many times. I did not look at the street.

He has quite a nice little establishment. It is not very much.

It looks decent.

47 He was engaged there in the tailoring business.

He had people working with him. Two of them, an Italian fellow and a Jewish fellow.

They were there when I came in.

Q. How big is this place?

A. Half a way this, and a portier- in the middle. Half as big as this room.

Q. Half as long as this room?

A. I can't recall the place. Divided off in three portier-s. One room separated in three places.

Q. You came in this room where the other two men were working and took these letters out of your pocket?

A. No, sir.

Q. Have them opened?

A. No, sir. I came in where the workmen were.

Q. You opened the checks in that room?

A. Opened in the room, in the room across where the portier-s were.

It was all in the same room.

Papa's desk was there.

I pulled those letters out of my pocket.

And opened them in Pakas' presence.

And looked them over to see which had checks.

I would have a dozen; all addressed to different people.

Q. And you opened them on the desk to see which had checks and which had not, and you took checks out and he gave you the pen?

A. The pen was on the desk and I took the pen and forged them.

I took the pen up and forged the endorsement on the back.

And gave the checks to Pakas.

Q. What checks did you get on Monday, the 13th?

A. $660, $1200, $107, perhaps one more check, small amount, I can't recollect.

48 Q. Is this the $107 check?

A. Yes.

Q. That you know is dated?

A. 9-10-15.

Q. You are positive you gave him that check on the 12th?

A. The 13th, Monday.

The Court: Whom drawn by?

Mr. McManus: That is Exhibit 3, drawn 470 Broadway, order of M. Furman & Company, it is dated New York ninth month, tenth day, 1915.

Q. M. Furman & Company, where is their place of business?

A. 136 Greene Street, New York City.

Q. Is that where you took that check from?

A. I took it from the letter box as I testified.

Their letter box.

The same day I say I took the check for $660.

I delivered that on the same Monday, the 13th to Pakas after I took it from a letter box.

That was a check also to the order of Furman. Also the $10 was the same date.

Q. You are positive you took the three checks on the one day, and you are positive that one day was Monday, the 13th?
A. Yes, because I remember I got $75 that day from Rosen and Wagner.
Q. Will you look at that check and note the date of it and see if it is dated September 18th and not September 13th, or before the 13th?
A. That is not dated the 18th. It is 9/8.
Q. Isn't the first date 9?
A. 9 and 8.
Q. Isn't the next 18?
A. 9 cross and 8.
Q. Can you show me the other check. Is it the same marks on the other?

(Check shown to the jury by Mr. McManus.)

49 Mr. McManus: 9/8 it is for the jury to say whether that is a line or a one.

(The witness whispers to the Court.)

Mr. McManus: This witness' anxiety is something to be curbed.
The Court: Did you gentlemen hear what he said to me?

(The jury indicated in the negative.)

Mr. McManus: I ask you to instruct him he is only to answer questions.
The Court: That is the best way.

Q. In any event you say you gave him that check on the 13th?
A. I gave him 13th, and also received it the 13th.
I gave him other checks on the 14th.
Others after that.
I gave him 11 checks.
I gave him more than 15.
Q. I am asking you the question: All are here produced and which you have identified here as having given Pakas are these?
A. I will count them. I will know. I didn't count them.
Q. We will give you the checks?
A. There are two.
Q. How many there?
A. Six.
Q. Those are all produced here and identified by you as having been delivered to Pakas?
A. Yes.
I say however I gave him other checks but that those checks are not here.
I was arrested September 28th, 1915, at Green Street corner of Allen by Officer Murphy.
Post Office Inspector Jacobs was not with him then.
50 Q. You were brought however to Inspector Jacobs or he saw you shortly after?

A. Seen after two or three hours later when I was arraigned. Captain Donnelly and Jacobs came in.

Q. You had a talk with Jacobs?

A. Tomorrow morning I had a talk there with him.

I told him I did it myself because I wanted to shield the others.

Q. You told him you had done all this work?

A. I told him——

Q. What did you tell him?

A. They showed me three checks and told me some more. I told them I am guilty. I didn't tell them——

Q. You know the distinction of telling them you are guilty.

——. ——.

Q. You didn't mention any other names?

A. I didn't want to mention.

I simply told Jacobs and other men I was guilty.

I had a number of conversations with Jacobs and the other men.

Q. How long after was it before you told him anybody else was mixed up in this thing?

A. I can't say.

Q. Will you please answer my question? How long after you were arrested was it you first told Inspector Jacobs Wagner or Pakas was mixed up in this thing?

A. Seven weeks after I was arrested, six weeks.

Q. Six or seven weeks. How many times had you seen Jacobs in that six or seven weeks?

A. I seen him twice.

Q. Is that all?

A. Once he came to the Tombs with Captain Donnelly.

Q. Who is Donnelly?

A. Donnelly from the — and showed me the list of checks
51 which Rosen, Wagner and Pakas deposited.

That was the second time I saw him.

Q. You didn't say anything about Rosen, Wagner or Pakas?

A. I told him bring me to the District Attorney, I will make a statement.

Q. How long after you made a statement?

A. After I had obtained a lawyer and I told him everything. I had a conversation with the lawyer and told him everything, and he told me, confess. Then I sent for this man (indicating Pakas) and wanted to get some money. I did.

Q. If he paid money to you you would not have squealed? Answer yes or no.

A. I wanted what was coming to me.

Q. Yes or no.

A. Positively.

Q. In other words, if this man gave you money you would not have come to this court and said he had anything to do with it?

A. I would shield him as much as possible.

Q. And the simple reason you are here now and testifying before this jury is because this man refused to give up to you?

A. It is not——

Q. Yes or no?
A. Because in time of need I helped him.
Q. It is because he refused to give you money that you are here?
A. No, I am acting with my conscience.
Q. That is what you said, isn't it?
A. You asked me another question.
Q. You said to me a couple of minutes ago if this man did you good you would not have been here testifying. Is that right?
A. It is right.
Q. And that is true?
A. It is true.

52 JOHN A. HOLZOPFEL, being called as a witness on behalf of the Government and duly sworn, testified as follows:

Direct examination.

By Mr. Beer:

Q. I show you Government's Exhibit 2, the same being a check for $660.80 and ask you to tell the gentlemen of the jury when you first saw that check and under what circumstances?
A. I don't remember the exact date, but it was a few days after the date of the check. I got it from Mr. Pakas. That is the defendant in Court here now. He gave me this check and another check; the other check was for something over $1,200.
Q. You got the one for $1,200 and that together?
A. Yes. He gave me those together to pay off a mortgage of $1,800 interest and cost. This was a mortgage, second mortgage on property 229 South 9th Street; the house where he lived. I asked him at that time where he got those checks. He said that he got them from this firm to whom they were made payable, from Mr. Furman, and said Mr. Furman had given him the checks to use to pay off his mortgage.
Q. I ask you to look at the back of that check and tell the gentlemen of the jury if that is your endorsement on that check?
A. Yes.
Q. What did you do with the check after you got it?
A. I took it down.
Q. You took that check here, with the $1,200 check?
A. Two checks down stairs to deposit.
Q. What hap-ened after that?

53 A. The cashier of the bank asked me if I knew the payee of the check. I said no. He said, "Well, unless you know the payee I wouldn't put them through the bank because they might turn up in three or four months after you paid out your money and be proved to be a forgery." Then I went back to the office and tried to find this firm in the telephone book. I am an attorney and counsellor at law.

Q. When was the next time you saw Pakas and had a talk with him about that check and the $1,200 check?

A. I didn't see him at once. I wrote him a letter that same afternoon. I took them to the bank the day he handed them to me.

Q. What is the date on the back of that check? There is a stamp?

A. That wasn't put on by the First National Bank. That was put on by the Columbia Trust Company.

Q. That is the bank you deposit in?

A. No, I put it in the First National Bank.

Q. Is there a First National Bank mark there?

A. No, they didn't take them. I took them right back. They were not deposited. I wrote a letter to Pakas. I know Pakas received that letter, because he called me on the telephone two days later.

Q. What was the talk on the telephone?

A. Pakas called me up and said he had received my letter to return my receipt and get his checks. I gave him a receipt for two checks aggregating the amount of $1,800 and some odd dollars to be applied on the payment of the mortgage if the checks were good or collected. After that he called me up two days after on the telephone and asked me why I didn't put the checks through
54 the bank, well, I said then, "It is simple enough because I wouldn't. I wouldn't take any risks."

He said the checks were all right and the same afternoon his wife came in and got the checks.

I don't recall what day that was on. There is no way I can refresh my recollection. He had been there the afternoon and I wasn't there. He endorsed that. There was the one endorsement on there. M. Furman & Company was on. That was both checks. I said, "You endorse them." He said, "It is not necessary for me to endorse them." I said I wouldn't take a check from anybody unless they endorsed it. He endorsed it in my office and I endorsed it and took it down to deposit it.

Q. Did you have a conversation with Pakas that day?

A. Yes, had several conversations after that.

Q. Were they in relation to the checks?

A. I don't think so; only incidental. He came in several times about paying something on the mortgage and to get an extension.

Cross-examination.

By Mr. McManus:

This mortgage was long overdue. The interest, I think had been paid at the last interest day. The holder of the mortgage wanted to use the mortgage and called it in, and he didn't pay it, and we commenced foreclosure.

Q. Weren't the taxes unpaid?

A. There were some unpaid. He paid some.

Q. And Pakas came to you and asked you for an extension of the mortgage previous to this?

A. I think he did. His wife had the property. It was in his wife's name. I think his wife had been in and asked for an

55 extension. I said I would extend it, or the mortgagee said he would extend it if they paid $800, extend it for six months. She said she would try and get the money. The next thing he came in sometime in September with two checks. They were endorsed M. Furman & Company when he brought them in.

Q. Did you ask him about where they came from?

A. Yes, I asked him how he came to have two checks uncertified out-of-town checks, and he said this man gave him them. Whether he said a friend or not, I don't know.

Q. So when he produced the checks to you and you asked him where he got them from, didn't he say to you he got them from a friend of his?

A. He said Mr. Furman gave them to him. Mr. Furman. I asked who Furman was and he said a friend of his.

Q. After that you went to your bank and the bank suggested the checks had better be put in for collection and not as a deposit?

A. No. The cashier said I was taking a risk of putting the checks through the bank if I didn't know the payee. And of course I did not know the payee. And at that time Mr. Pakas' name was on the back of it; on the back.

Q. Mr. Pakas had lived in that house how long?

A. I had known him for six or seven years.

Q. And he had been paying the interest right along?

A. Paying the interest. I knew he was a business man and a reputable man. Otherwise I would not have touched the checks. But knowing him to be a business man I supposed the checks were all right.

56 JACOB FALK being called as a witness on behalf of the Government and duly sworn, testified as follows:

Direct examination.

By Mr. Beer:

Q. I show you the check marked Exhibit 2 and ask you to tell the gentlemen of the jury where you first saw and under what circumstances?

A. It was presented to me by Mr. Pakas. The defendant here. My business is tailors' trimmings. I remember when he gave it to me; September 16th. He owed me money at that time. Somewhere in the neighborhood of $50 and he gave me a check for $660.80. He brought it to me and asked me to put it through my bank, that this money was loaned to him by one of his customers and he needed this money to put off a mortgage on his house which was to be foreclosed unless he paid up the mortgage. I asked him about the maker of the check. He told me the party that he got the check from received it from this party that endorsed it, M. Furman & Company. I gave the check to my bank for collection, not as a deposit, for collection.

Q. You did something more than that, didn't you?

A. He told me to put it through the bank and when it was paid I

should pay him the money. I asked him who M. Furman & Company was. He said he didn't know.

57 Q. When did you next see him about it?

A. I put it through the bank and I heard from the bank about it.

Q. What did you tell him, if you told him, what the bank said?

A. I called him up after the check was paid about four or five days afterward, I told him the check was paid and I wouldn't pay out the money until I knew who the check was given to by him. So he said he would bring the party to me.

Q. He said he would bring M. Furman to you?

A. No, the party who gave him the check. I told him I would wait until he would bring the party to me before I would pay out the check.

Q. What else?

A. He didn't produce him. I waited about a week and finally I decided to write to the party who made the check.

Q. Did you write to the party?

A. I did.

Q. Did you get some answer.

A. I did.

Q. Then did you have another talk with the defendant after you got an answer?

A. I called up Pakas and told him that this check must have been forged. They gave me the name of the party. I looked up M. Furman & Company in the telephone book and couldn't find them.

Q. You went to M. Furman?

A. After I heard

Q. After you heard from Indiana?

A. Immediately called them up.

Q. You had this talk with the defendant?

A. No.

Q. Who do you mean, you called up?

A. Mr. Pakas.

Q. What you said to Pakas, you may tell?

A. I called Pakas up and told him this concern had an-

58 swered me and gave me the address of the party M. Furman & Company. Well, I tell you, I believe I first called up M. Furman & Company and later on Pakas.

I told him there seems to be something wrong with the check. I called Mr. Furman on the telephone and told him the circumstances and he told me to come down and see him which I did the next day.

I saw Furman after I called Pakas.

Q. What did Pakas say to you after you told him the check was a forgery?

A. He seemed to be surprised.

Q. What did he say, do you recollect? What did you say to him? After you had this check in your possession a week you heard from Indiana that the check was paid?

A. I heard from my bank.

I received notice the check was paid. The $600 was credited to my account. I received the credit of $660.80.

That was not a week after Pakas gave me the check, several days, not a week, about four or five days after. I waited another week until I wrote to this concern at Indianapolis.

Q. In the meantime had you credited Pakas' account on your books?

A. I did not, sir.

Q. A week later you called up Pakas. What did Pakas say to you when you told him it was a forgery?

A. Well, as I say he seemed to be surprised at it.

Q. You don't know whether he was surprised? It was over the telephone.

A. As far as I can recall he was very much surprised and he was to see the party who he had the check from, but tried to locate him for me and couldn't do it.

59 He tried to locate him and couldn't do it.

That is all there was with Pakas until I learned that the check was forged. It was later on I heard there were checks stolen from the mail. I had no further talk with Pakas. Pakas never located the man who made the checks or the man who forged the check.

The Court: You had to pay the money back?

The Witness: I did, to my bank.

Cross-examination.

By Mr. McManus:

I never paid that $660 to Pakas; he never received anything from me; he has paid his own bill independent since then, that $50 bill.

Pakas came in there and asked me to deposit that check for collection, and at the time he brought it to me it had an endorsement M. Furman & Company and also had his name, V. Pakas; his name is V. Pakas. I had been dealing with him a number of years. On my direct examination I said that he said he got this from a friend of his; from a customer. He didn't say from Furman. At no time in our conversation did he say he knew Furman. He said his customer had gotten it from Furman & Company.

Q. And when you put the check through your bank and the amount was credited to your account, why you sent for Pakas again, didn't you, before you intended to pay the money over to him?

A. I called him on the phone.

Q. And you asked him again about Furman & Company?

A. No. I asked him about the party he got the check from.

60 Q. What did he say to you then?

A. He said he couldn't locate him yet.

He never said he got it from Furman & Company.

Q. So later when you heard from Indianapolis you called him up again?

A. I called up M. Furman & Company first.

I then had a talk with Pakas.

Q. About what time in September was that?

A. September 16th I looked up my deposit slip.

It was after the check was paid I had the talk with Furman. The check appears to be stamped the 18th. Very likely I put it through my bank on the 16th. It was paid the 18th evidently. It was sometime after the 18th before I had this talk. It wasn't until after the money had been credited to my account that I talked with Furman & Company.

Q. About when was it now, do you recall?

A. About 10 days after I received the check, as I say, I waited a week until Pakas could produce the man he got the check from and when he couldn't do it I corresponded.

I know Pakas. I deal with him. I know other people who know him. Other people he deals with.

Q. Do you know what his reputation is for truth and veracity?

A. I never knew anything against his character.

I sold him on credit, and paid his bills. I have been dealing with him, I think, ten years. I never heard anything against his character; never heard anything against his character, no.

Q. Can you say whether his reputation for truth and veracity is good?

A. Yes.

61 Redirect examination.

By Mr. Beer:

I was not subpœnaed by the other side.

Q. It was your brother then. Are you Max or Jacob?

A. Jacob.

My brother knows Pakas. My brother is in the same line of business as me.

Recross-examination.

By Mr. McManus:

Q. Not with me in business; separate and independent.

By Mr. Beer:

Q. It was ten days after you called up Pakas and he said he would try to get this man?

A. I spoke to him shortly after it was paid.

Q. This was paid in Indiana?

A. No.

Q. The check is drawn Indianapolis, Indiana, Merchants' National Bank. You weren't given the credit for this check until after it had been O. K.'d in Indiana?

A. Yes.

Q. You got the check. It was sent to Indiana, and after it arrived

there, your bank received word the check was paid and then gave your account credit for that amount of money?

A. That is right.

It was ten days after I was credited that I called up Pakas.

Q. Ten days after you knew the check was all right, or was it a week?

The Court: How does that make much difference?

A. Just a few days. In fact, it might have been the day following and I told him about it.

62 Q. Did you notice that scratched endorsement, those two scratched endorsements on it at the time you took the check, Holzopfel and the Columbia National Bank?

A. I don't recall seeing those endorsements.

I know Pakas' endorsement was on there. I didn't see what was underneath. I didn't endorse it.

MORRIS FURMAN being called as a witness on behalf of the Government and duly sworn, testified as follows:

Direct examination.

By Mr. Beer:

I am M. Furman of M. Furman & Company. My business is 622 Broadway. I was formerly located at 122 Greene Street. My letter box was in 132 and 134, the letter box was in 132.

Q. Did you have a letter box broken up during September last year, 1915?

Mr. McManus: I will concede that the witness already on the stand testified to that and won't dispute.

Government's Exhibits 2 and 3. Did those checks come from firms I was doing business with.

We had an account with somebody for $1,200 and some odd dollars. The name was Joseph Lazarus, Cincinnati.

Q. I ask to look at the back of these two exhibits and tell the gentlemen of the jury if they were endorsed by your firm?

A. No.

They are forgeries. I know the endorsement of my firm.

No cross examination.

63 MAX FALK being called as a witness on behalf of the Government and duly sworn, testified as follows:

Direct examination.

By Mr. Beer:

Q. I show you Government's Exhibit 3 and ask you to tell the gentlemen of the jury when you saw that first, this check for $107?

A. September 13th, the day I deposited it.

Q. The stamp is on there, the date?

A. Deposited September 13th and I must have received it then. I got it from Pakas.

Q. Did Pakas endorse that?

A. He brought it to me endorsed.

Q. Did you see the endorsements, the Pakas name, at that time?

A. I didn't take notice. I only saw Pakas and considered that all right. I did not ask him if that was his name. I exchanged many checks before. I am friendly with Pakas and know him a long time. I found out the check was bad five or six days thereafter. I got it September 13th. The bank called me up. I saw Pakas about it then. I asked him how this happened, so he told me this was given to him by a young man as part of a loan to pay off his mortgage. I asked him did he know the man. He told me he was introduced to him by a tailor in Brooklyn, and this young man told him he inherited some money from an uncle.

64 ARCHIBALD IRELAND being called as a witness on behalf of the Government and duly sworn, testified as follows:

Direct examination.

By Mr. Beer:

Q. I show you this check, $10.85, Government's Exhibit 4, drawn to the order of the Union Pleating Works. I will ask you to tell the gentlemen of the jury when you first saw me unless I refer to a note in my pocket was made at that time, it was handed to me in payment of a bill for goods purchased by Pakas that was September 16th. Pakas gave me that September 16th.

Q. Did you have any conversation with him about that check later on?

A. That one? I am not clear about this particular one.

Q. Then I show you this check drawn on the Clover Hat Company, Findlay, Ohio, $21.30, Government's Exhibit 5. I show you that check — that and under what circumstances?

A. I cannot give you the exact date that was handed to —.

—. And ask you where you first saw it, and under what circumstances?

A. That was handed to me September 20th in payment of a bill, the net amount of which was $20.46. I did not talk with Pakas about that. I did not go to see him. Not until the check was returned. When the check was returned to me what I personally saw Pakas and told him it was a forgery. I think the check was returned to us with a slip on it, endorsement forgery. I talked to Pakas then. I asked him where he got it from; he said he cashed it for a friend. Cashed it for a friend. I asked him if he was
65 going to make it good and he gave me a check, or it might have been cash, but I am pretty sure it was a check for $12. That was October 22nd. Then, later on I saw him, and finally when I saw him later on, after the 22nd, I saw him again and probably once more before I got the balance of the check.

Q. You had told him both of these checks were forgeries. You don't remember what conversation you had with him about this check, Union Pleating Works?
A. No, sir.

Cross-examination.

By Mr. McManus:

Q. When you called the matter to the attention of Mr. Pakas, Mr. Pakas, pronouncing these checks had been returned, told you he had received them from a friend?
A. That particular one.
Q. This particular one, $24?
A. Yes, $24.30.
Q. You don't remember any conversation with relation to the other?
A. I won't be positive. After I told Pakas this check was a forgery and been returned, he told me he had received it from a friend, he paid the amount of the check back to me eventually, in two payments, the other check, $10.85 he made good on that but when I don't remember. I have lost nothing by this transaction.

Redirect examination.

By Mr. Beer:

He told me he had cashed it for a friend.

66 FRANCIS E. MCCALL being called as a witness on behalf of the Government and duly sworn, testified as follows.

Direct examination:

By Mr. Beer:

Q. I show you this check, Mr. McCall, and ask you to tell the gentlemen of the jury when you first saw it and under what circumstances, Government's Exhibit 7, check for $79.40?
A. This was handed to me by Pakas. I would say around the 20th of September, might have been the 19th, might have been the 20th. One of those two days. For paying a bill to my firm in Boston.
Q. How much did he owe your firm then?
A. If I remember right it was forty some odd dollars. I did not ask him where he got it. I sent it to my firm, and asked them to send it to me. The firm sent me back the check.
Q. Is this the check you received at that time?
A. I think that is—that is the check. I was to give Pakas cash for the balance of the check. I gave him the cash.
Q. And you credited his bill, the difference he owed you, and you gave him the cash?
A. Yes. I got a communication at my house. It had been returned through their bank. I sent for Pakas.

Q. How long after this was that?

A. The same day.

Q. Not the date on the returned check. What is the date of that? The check you got from your firm.

A. September 21st.

Q. You received it about when?

A. The next morning.

67 Q. 22nd?

A. 22nd.

Q. How soon after that did you find out the check was bad?

A. I would say ten or fifteen days.

Q. About fifteen days later that would make it the early part of October?

A. Yes, that is about right.

Q. What did you do then, if anything, as far as Pakas is concerned?

A. I sent for him. I / told him I had a bad check from him and he said he had had some others, he said he had some other bad checks he had taken and used. That is all there is to it. Then, of course, I said what will you do. He said, "I am going to pay all I can now," and he gave me forty dollars, and he asked *he* how I would make it good. I said, "I will send my own check over there and make it good and you some up and hand me the balance when you can." Which he did later.

Cross-examination.

By Mr. McManus:

When I notified him my firm sent word to me this check had been returned to me as bad, he came right to me and volunteered the statement he had some other checks that came back to him the same way, and I asked him what he was going to do about it, and he said, make it good. And then and there he paid me forty dollars. Either that day or the following day. The whole amount of the check was $79.40. And later on he made good to me personally the balance between $40 and $79.40. He owed my firm the difference between $47.60 and $79.40. And that was deducted

68 from the amount he gave me in the first instance, $79.40.

Q. And when this check was handed to you Pakas put his own name on the back of it, Government's Exhibit 7, put his name on the back of it?

A. When he turned it over to me he endorsed it in my office.

Q. Pay to ——, V. Pakas?

A. Yes.

He has been a customer of ours through me about two years to my firm.

You have known him two years, two and a half years.

I know other people who know him in the trade.

I know what his reputation is for truth and honesty.

I know other people with whom this man is acquainted in the City of New York.

Q. Do you know what his reputation is for truth and honesty?

—. ——.

Q. What is it?

A. Good, always good or we wouldn't deal with him.

Q. And you wouldn't have taken that forged check?

A. No, I believed the check to be good.

(Mr. Beer calls for a representative of the Monarch Specialty Company.)

Mr. McManus: I will concede that witness will testify that signature is a forgery, Government's Exhibit No. 6, Monarch Specialty Manufacturing Company, but not with the knowledge of the defendant.

69 CELIA FLAUM being called as a witness on behalf of the Government and duly sworn testified as follows:

Direct examination.

By Mr. Beer:

I know Pakas sitting here. I first see him in the prison with Sam Broder.

Tombs Prison New York.

I heard this man and Sam talk together.

Sam says to Mr. Pakas that I want you should help me out. So Pakas said I cannot now because I am in too bad a condition, the house is on mortgage. He gave him a newspaper there to read that the house is on the mortgage. So he could not help him out. So Sam says can't you gave me anything. He says no.

I can't remember when that was, I can't remember the date. He not give him any money at all that day.

Not the day I was there. I did not see him again in any other place but the prison that is the one time I went to the Marshal/ in the office to get a pass and when I came in Mr. Pakas was there with the Marshal/. After I came down he went down. He went down another door and when I came in the prison I saw him there.

There was not anything then said about a lawyer. I didn't hear. I did not hear Sam say anything to Pakas about a lawyer that time.

Q. Is there anything else you remember that was said?

A. No. I only saw he gave him a paper to write, the paper he should collect money.

70 Q. He gave Sam Broder?

A. Sam Broder should sign the name on the paper so Sam, he says, sign, so I will bring you money, Pakas said.

He said sign your name on this paper I will bring you some money. I do not know what was on the paper. Sam did not sign the paper.

Cross-examination.

By Mr. McManus:

That was at one time when I was in the Tombs.

When Broder asked Pakas to give him money Pakas said he didn't have money and he showed him a notice of foreclosure on his house.

It was at this same interview I saw Pakas give him a paper to sign, and said put your name on that. He said Sam sign your name and he will bring him the money.

I don't know what the paper was, or what was on it, or anything about it, or what the contents were.

The Court: Did he sign it?

The Witness: No.

NATHAN LIGHT, being called as a witness on behalf of the Government, and being duly sworn testified as follows:

Direct examination.

By Mr. Beer:

My name is Nathan Light. I live at 606 Fifth Street. I am a cousin of Sam Broder.

Q. I show you that paper and ask you when you first saw it?

A. I don't remember but I got this paper.

71 Q. What is the date on the paper?

A. I think it is the 17th.

Q. October 17th, I took the letter up and didn't find Pakas and gave it to Mrs. Pakas.

I did not see Mr. Pakas at all about the letter the first time, I saw him the second time. I gave him the letter and told him Sam wants $50. He told me he will be there to-morrow.

Q. Where was that, where to-morrow?

A. He said to me I will be over there by to-morrow in the Tombs.

Mr. Beer: I offer it in evidence. Testified to as having been written by Broder, delivered by his cousin, and his cousin brought it to Pakas.

The Court: It is testified this witness gave it to Pakas.

Cross-examination.

By Mr. McManus:

When I saw Pakas, I gave him that paper. I did not get it back.

Redirect examination.

By Mr. Beer:

Q. You cannot speak English, can you?

A. I cannot write English, I only sign my name.

Recross-examination.

By Mr. McManus:

Q. Just tell us what Pakas said to you when you went over to see him?

A. Pakas didn't tell me anything. He said I will go there the next day and see him myself.

(Letter read to the jury.)

72 JOSEPH CROWLEY, being called as a witness on behalf of the Government and duly sworn testified as follows:

Direct examination.

By Mr. Beer:

My occupation is keeper in the City prison. This book is a record of the visitors to the Tombs prison on the 18th and 19th of October.

Mr. McManus: We will concede Pakas went to see Broder in the Tombs on the 18th and 19th of October.

EDWARD T. CURRAN, being called as a witness on behalf of the Government and duly sworn, testified as follows:

Direct examination.

By Mr. Beer:

I am an attorney and counsellor at law of the State of New York. As such I was attorney for Sam Broder one of the defendants in this action.

Q. Did you make a visit to him on or about the 19th day of October, 1915, in the Tombs?

A. I visited him in the Tombs. The date exactly I cannot recall.

Q. I show you these three letters. Who are those letters addressed to?

A. One letter addressed to Mr. Wagner, another letter or note addressed to Mr. Rosen and another addressed to Mr. Pakas.

They are identical. The wording of the letters and writing are so, I believe. Yes they are.

73 I took that letter which is addressed to Pakas I took the letter to him immediately, visited the three places, and I have no knowledge of the men, never saw them before or since. But I went to a man who called himself Pakas, and Wagner and I saw him and a Mr. Rosen.

Q. I point out this man Pakas?

A. At 303 Fifth Avenue.

Q. This is the man you saw at 303 Fifth Avenue?

A. I am not too positive as to him. I was over there and saw a man who answered the name and read the communication.

Q. Read the communication to the jury.

The Court: Is there any evidence yet——

A. The man I saw there, I did not know the party.
It looks like him. I have no reason to believe it was not him.
The Witness: I have reason to believe it was him.
I read it to him.
I never saw the man before that visit, and never saw him since. I talked with a man who looks like that man there, six or seven minutes.
I did have a talk with him after I read them.

The Court: What is the importance of this? If this identification was not sufficient that would be error.
Mr. Beer: I want to show—I would just as soon not make my argument in the presence of the jury. It might prejudice the defendant.
74 Mr. McManus: Let us step up to the Court.

(Court and counsel converse together.)

Government rests.

Mr. McManus: I ask your Honor to take the case from the jury and dismiss the indictment upon the ground that the facts established do not show the commission of the crime charged.
The Court: Motion denied.
Mr. McManus: I respectfully except to your Honor's ruling.

(Mr. McManus then opened to the jury on behalf of the defendant.)

VICTOR PAKAS, being called as a witness in his own behalf, and duly sworn, testified as follows:

Direct examination.

By Mr. McManus:

I live at 2105 Clinton Avenue, Bronx. I am about forty years old. I am married. I have three children. I formerly lived in Brooklyn for ten years. I was living there in the Fall of 1915 at 229 South 9th Street.
At that time I owned this house until November 27th. It was in my wife's name.
I was in business in New York at that time at 303 Fifth Avenue, corner of 31st Street.
Q. Were you in any financial troubles in the Summer and Fall of 1915?
A. Except that mortgage.
The mortgage was about to be foreclosed on my house. I tried to raise the money. I went to the Title Guarantee & Trust
75 Company, Lawyer's Title—I was not able to get it.
My shop was on Fifth Avenue. I met this man Broder first sometime in June, 1915, in Wagner's shop. Wagner I knew

about a year and a half. My home was in the neighborhood of Wagner. Around the corner. Wagner's was a tailor shop.

Q. How did you come to go in his shop?

A. The barber had a suit made in his place, and asked me to come in and see how it fits. I was introduced then. June, 1914.

Q. When you met Broder it was in June, 1915?

A. About June or July.

I did not have much talk with him then. I met him again a few days afterwards.

I did not have much talk with him then. Just conversation about clothes and so forth. I met him in September.

Q. Who was with him when you met him in September?

A. I came out from the barber shop, it was right next door to the barber's, and I went into Wagner's. I usually used to go there and that Broder was there, and I was kind of downh-arted and Wagner asked me if I got that mortgage, he wanted to know whether I raised the money. I told Wagner that I just was turned down by the Title Guarantee and I wasn't able to get that mortgage. Wagner said: "Here's a young man, he is a fellow of money, and I think will be able to help you out." I told Broder my situation. I told him that a mortgage is coming due, and the lawyer is t-reatening to foreclose, and I have tried every which way to raise
the mortgage and I couldn't do it up to then. Broder said,
76 after a while he said: "Pakas, I will help you out. I will
come up in your office to-morrow morning." That was all the conversation and then I went home for lunch, and the next day at half past nine Broder came in my store on Fifth Avenue, and he gave me two checks. He took out just two checks from his pocket and said: "Here, go to your lawyer and give him those checks and when you get the mortgage we will take it over. I will take the mortgage from you when you get this paid."

Q. You heard the testimony of Broder to the effect that he came in that morning with a number of letters that were sealed that he tore the letters open in your presence, that he took the contents of the letters out, and where he found there were checks he took those checks and endorsed them in your presence with a pen which you furnished?

A. No, sir; they were endorsed when he gave them to me.

Q. Was there anything like that testified to by Broder done by Broder on that Monday morning or any time?

A. I don't understand.

Q. Did Broder at any time endorse any of these checks in your presence?

A. No, sir, I never saw him endorse a check.

I did not go with him to his house. I did not go with him on the Sunday he testified. I did not go with him to his house. The first time he gave me checks was the two checks, $600 and $1200, those were the first two checks.

Q. Now the $600 check is that the one over here in evidence, $660, is this the one (handing the witness Government's Exhibit No. 2)?

A. Yes.

77 At the same time he gave me the other check for $1,200.

Q. Do you remember how that was endorsed at the time he gave them to you?

A. Both made out to M. Furman & Company, and I thought he was connected with that firm. He did not say anything to me about it. He did not tell me what firm he was connected with. After I got those two checks I immediately went to Holzopfel and gave them to him. I didn't find him in at half past eleven. Holzopfel wasn't there and I talked to him in the same office, and while talking to him Holzopfel came in. I told him I got these checks from a friend of mine which he loaned them to me to pay that mortgage. He said you are very fortunate in getting it because —— —— is anxious to get that money, and he gave me a receipt just for receiving checks, two checks, and said the amount, how much they were for. I endorsed these checks either V. Pakas or Victor Pakas. That is my signature on the back of that.

Q. Did you take the receipt for the checks from him?

A. I took the receipt and he got the checks. I was relieved that I found somebody to relieve me of that mortgage. I did not do anything that same day with Holzopfel at all.

I left the checks with him. He did not tell me what he was going to do with the checks, whether he would deposit them or leave them with the bank for collection.

Adjournment taken at 5:45 P. M. to 10 A. M. the next day.

78 10:00 a. m.

Met pursuant to adjournment.

Appearances: Parties as before.

VICTOR PAKAS, resumed the stand.

Direct examination (continued).

By Mr. McManus:

Q. We were asking last night at the time of adjournment about transaction with Holzopfel, your going there to him and giving him these checks. When you left Holzopfel, the time you brought him the checks, when did you next hear from him?

A. About two days after. Meanwhile I saw Broder.

Q. Did you have any other talk with Broder, or transaction?

A. Yes, he came up the next day and brought me a few more checks. I forget the checks which they were.

Q. What were they?

A. $107 and $97 or $79.

They have been introduced in evidence here. I went over to Mr. Falk. That is the gentleman who was on the stand yesterday. I paid part of a bill with that check and he gave me a few checks to cover other bills. In other words I was indebted to various parties,

and I gave this check to Falk in payment of some bills I owed, and I got some checks from him to pay bills to other people.

Q. What did you do after that, that was the $107 check?

A. Yes. The other check was $79, I gave to Bummer Jones Company, McCall. McCall was the witness who testified on the stand yesterday. I owed them a bill at Mr. McCall's office. I gave him the check and he gave me part some money and a check I paid to somebody else.

79 Q. What for—on account of another bill you owed?

A. Yes, because I haven't any bank account, for that reason I was obliged to when I got a customer, I went to a woolen merchant or a trimming merchant and I cashed them that way. That is the way I had to do that time.

Q. What other checks were there you received from this man you know, was there a check for $10.85?

A. Yes.

Q. What did you do with that and when did you receive it?

A. I think I received it about the same time.

Q. Where did you get them from Broder?

A. In my office.

He did not tell *you* where he got them. He did not open any envelopes or mail in my office and take those checks from them. He never did that in the course of the interviews or occasion on which I saw him. He never endorsed names on the back they were already addressed when he gave them to me. Right in the front vestibule in my office. That is where he gave them to me. In the front vestibule. My office is divided into three parts. The $10.85 check I took to Fisher's. They were dealers with whom I traded. Woolen merchants. I gave it for a bill I owed. I also gave that check to Fisher. That is all the checks I received except the time Broder came to me and I told him I got the checks. That is all the checks I received up to the time I went to Holzopfel. At no time up to this time did I know anything about—did I know any of the endorsements were forged. I never saw Broder put a pen to any one of these checks. I came to go to see Holzopfel. He wrote me the bank will not accept these checks for deposit, for collection,

80 and he didn't want to leave them that way, and he wanted his receipt back. I sent my wife and he gave the checks back and got the receipt. She brought them to me and the following morning Broder came in and I told him about that, and he took these two checks in his hand, the $1,200 one he tore up in my presence. I said, "For God's sake, what are you doing that for?" He said "That's all right, I know what I am doing." He handed me that $600 check and said "You deal with merchants. Go and see if you can get this cashed." And he took out another check three hundred dollars and something and gave it to me and I took it. I went with that check to Jacob Falk and told him to put it through the bank. With the money from that check I was going to pay the money on the mortgage. I never received a dollar on either the 660 or the $1,200 check.

In other words, I got different checks back from Max Falk.

Q. What was done with the money on that check?

A. I have paid as I said before part of the bills to different people. In other words, I got different checks back from Max Falk. And used these checks to pay different bills owed.

Q. When did you discover this check, Exhibit 3, check dated September 10th, 1915, to the order of Furman, $107.10, that the endorsement was forged? When did you learn that first?

A. The first check was the $600 check? That was the first one I learned was wrong and I kind of suspected this will be the same.

81 After I learned the $600 was wrong, I never had any other transactions with checks with this man Broder; the transactions consumed from the 13th, Monday, until the end of the week, either Friday or Saturday.

After that, I had no transaction whatever with him. I received checks altogether about seven from him; no such number as fifteen, as testified to by Broder.

I first learned there was something wrong with these checks when I asked Broder to produce Mr. Furman as Mr. Jacob Falk asked me. The first person who spoke to me about the checks was Jacob Falk.

Q. Was that following the delivery of the $660 check to Falk?

A. Either Tuesday or Wednesday the following week.

Up to this time I did not know anything was wrong.

Falk called me on the phone and said the check was paid. Before he pays the money to me he wants to know who Furman is.

Of course, I couldn't locate Broder and the same day in the afternoon he came in and I told him; told him Falk collected the money on the check and wouldn't give me it, he should bring Furman. He said Furman is out of town, in Philadelphia, and might be here next day, and I told to Jacob Falk he should wait a day or two days until I could bring Furman to see him, to identify him. The next thing that happened, was Broder came around and he says he can't produce Furman. He couldn't produce him and at that time I surmised something was wrong.

82 Q. What did you do after that, after you surmised something was wrong, what was the next thing you did with respect to any of these checks?

A. I went to Mr. McCall.

Q. Did Mr. McCall send for you or did you go voluntarily?

A. I went voluntarily.

I told him I believe that check is going to come back. If it does he should not do anything. I also gave Fisher & Sons two checks which I suspepcted. I waited it should develop. I heard from them.

Q. Was it Mr. Ireland who was here yesterday?

A. Yes. He was from Fisher & Son.

Mr. Ireland called me up first and said there is a check for $10 and something, come back, what about it. I told him I got it from a certain party in which I got the other checks. I expected the other will come back and if it does I will make it good. This was following the $660 check. All these instances followed the $660 transaction, and my knowledge of the $660 check.

Q. All these instances followed the $660 transaction, and my knowledge of the $660 check?

A. Yes.

Q. What about the $107 check?

A. About at the same time Falk came in with that check and I gave him $40 right away, and the balance as soon as I could. I told him I would make it good and as soon as I did I paid the difference which I have receipts for.

Q. This check to the order of Monarch Specialty Company, $312.05, to whom did you give that check?

A. At the time when Broder could not produce M. Furman & Company, I took a blank piece of paper and an envelope
83 and wrote a little a line, and sent it back to the maker of the check. Samstag and Hilder.

I did not give that check to anybody. I did not use this check of Samstag & Hilder, this one for $312 to the order of Monarch Specialty Company, dated September 14th. I sent it back. I sent it back to the maker of the check. That was after I discovered there was some question about the other checks. I paid back the $10.85 represented by Exhibit 4 im*im*mediately.

I paid the $24 represented by Exhibit 5.

I paid the $79.40 represented by Exhibit No. 7.

I paid back the $407.40 represented by Exhibit 3.

I never received the $660.80 represented by Exhibit No. 2.

I never used this check, Monarch Specialty Company, for $322.05 represented by Exhibit 6.

When I discovered things were wrong, I turned it back to the maker of the check.

Those are all the transactions I had. This is all.

Q. And the check for $1,200, to which you testified and which you gave to Holzopfel?

A. Yes, and which Broder tore in my presence.

Q. Did you know at this time, or up to this time, Broder had been in any trouble or convicted of any crime, up to the time you had these check transactions?

A. No, only after I learned the first check came back.

It was before his arrest.

I learned that from Wagner.

I never heard it before.

I did not know at the time of the transaction there was anything wrong about Broder at all.

84 Q. When you got these other checks for $107, and these other items, $79 and $24 and $10.85, how did you come to take those, after having received $1,860? How did you come to take those from Broder?

A. I had to have around $2,000 or $2,100 to cover that mortgage, and knowing it was coming to me from the Equitable, a policy of $225, I knew I would have that money in time to cover the $200 to pay that with.

Q. The additional sum beyond the $1,860?

A. Yes.

Q. Did you ever raise the money to prevent the foreclosure?

A. I did. I raised $500, and I had a certified check on the 15th of October. I went over with Mr. Ernest, a lawyer of mine.

He is my cousin. He went to Holzopfel, and I suppose Holzopfel didn't want to recognize this is a certified check.

He did not take the check.

After the property was foreclosed, I first heard Broder had been arrested. I think about the following week.

That was about September 28th.

I did not go to the District Attorney's office after that.

I went to the District Attorney's office around October 9th, I was called as a witness.

I saw Mr. Beer. I went into his office.

I made a statement, what I just repeated before.

I saw the defendant in the Tombs.

Q. Now did you come back to see him?

A. He sent a note up to my house requesting $50. I went
85 there and I showed him from a newspaper printed notice of my foreclosure proceeding, and I told him he put me in all that trouble and how he could expect me to give him money, for what. He said, "Pakas, I will help you out. I have an account with the Century Bank, but I haven't got the blank. Bring me a blank of the Century Bank checks, and I will give you $500." So that was all the conversation I had that day with him. The following day I went, but at that time the Phœnix & Chatham Bank was amalgamated with the Century and I went to 33rd Street and got a blank from them and went the following day down to see him. When I went to the Tombs he said, "I have changed my mind. The authorities might learn where I have money and might take it away from me, and I wouldn't have it when I came out from prison."

Nothing further said between Broder and me.

Q. Did you, at any time, either before or during the course of the deliveries of these checks for you ever promise him any particular sum of money, $100, as he testified to, a suit of clothes and an overcoat?

A. No, sir.

Q. Did you ever promise to make a suit of clothes or an overcoat in consideration of his giving you these checks?

A. No, that was a side issue. He said he wants me to make a suit of clothes, but outside of the money for the mortgage he will pay cash for the suit.

I don't know anybody named Volina.

I did not send him to any other tailor and tell him to get any suit made by this tailor.

At no time at all.

I never met him and told him Wagner met me and told him to get away, the detectives are after him.

86 I never had any conversation like that at all with him at any place.

I never asked him not to give me big checks, but give me small checks. I think he so testified yesterday.

That I could not cash big ones.

Q. Now, at no time from the beginning to the end in all these transactions, up to the time when you learned about the $660, or had suspicion of the $660 check, after hearing from Falk, did you know this man had taken these checks from the mails of the United States or from letter boxes in buildings, that he had stolen them from these places?

A. No, sir.

I did not know he forged the endorsement on the back of any or all the checks he gave me.

I never saw him endorse a check in my presence.

Cross-examination.

By Mr. Beer:

I know this Wagner about a year and a half.

I knew Rosen. I got shaved there. I was pretty friendly with Rosen and Wagner.

I say it was during June, 1915, that I became acquainted with Broder.

And that acquaintance continued during the time I was visiting Wagner and Rosen's place on Broadway, Brooklyn.

Q. And you went there and Wagner asked Broder to measure you for a suit of clothes?

A. Yes, that was the first time when I met Broder.

When that was I don't recollect, either it was around June or July.

Q. Was it around the latter part of July?

A. I don't know. I don't remember.

Q. At that time Broder was working for Wagner?

A. I don't know about that.

87 Q. If wagner told him to go and measure you for a suit of clothes wasn't that very good evidence that he was working for Wagner?

A. No, sir. I was at the time in Wagner's place when Broder came in that evening. He came in with a little bundle under his arm, and that was around eight o'clock or so, and Wagner introduced me to him as a cutter, that he is a cutter of clothes. Wagner introduced Broder to me as a cutter of clothes, and he told him I was a customer, he should take my measure for a suit, which he did.

After that I saw Broder in Wagner's place about two or three times.

I did not know Broder was working for Wagner at that store.

Q. When was it you had the conversation with Wagner about being hard up for money, and the mortgage on your house being foreclosed?

A. That was the latter part of July.

Or the early part of August, perhaps. Around about that time.

Q. It was not about September that you were measured for a suit of clothes?

A. No, sir; it was the first time when I met Broder. The first time I met Broder.

That was July; something like that.

The latter part of July. Either June or July.

Q. It was about the same time you told him though, you were in need of money?

A. No, sir. I never spoke to Broder I needed money.

I told Wagner the mortgagee called for his money and I was trying to raise a mortgage.

Q. How many times did you tell Wagner that you were in need of this money and had to have it?

A. Not any particular time.

88 Simply by coming in at times, he asked me if I procured that mortgage.

Q. So when you went into Wagner's place, he always asked you if you needed money?

A. No, we talked about tailoring in general.

Q. Broder was present on one of these occasions that you spoke to Wagner and told him that you had to have money and told him your mortgage was being foreclosed, the following Monday?

A. Yes, sir.

I told the gentlemen of the jury Wagner told me this is a man of money.

Q. Was there anything in Broder's appearance that led you to believe Broder was a man of money?

A. I don't know.

Q. You know there wasn't anything in his appearance, don't you to indicate he had money?

A. I don't know.

Wagner told me Broder was a cutter.

Q. That would not lead you to believe that the man was a man of money?

A. At the time he told me he inherited an estate from an uncle of his.

He told me that about around the same time, either later or before, I forget which.

After I got the check, I believe it was.

Q. Was it after you got the checks he told you he inherited an estate from his uncle?

A. I can't remember when it was, either before or after.

Q. This boy who walked in there with a bundle that night and Wagner told you he was a man of money, and Broder told you he had inherited an estate from his uncle?

A. Broder didn't tell me that; Wagner told me.

Broder never told me that.

89 Q. It was on the strength of what Wagner told you you believed Broder?

A. I believed Broder for what?

Q. That he inherited an estate from his uncle?

A. I took his word.

Q. All these checks you got you believed you were getting from his estate of Broder's uncle?

A. On the strength——

Q. Yes or no. All these checks you were getting you were taking because you believed Broder had inherited an estate from his uncle?

A. Possibly.

Q. Possibly. You know it is not so, don't you, Pakas?

A. I know what isn't so, with these checks?

Q. What day in the week was it this conversation occurred in Wagner's store?

A. It was on a Sunday noon, Sunday, around noon.

Q. But it was an evening at eight o'clock prior to that he measured you for a suit?

A. No, that was a month or six weeks or eight weeks before that. It was Sunday I had this conversation in Wagner's store in the presence of Broder.

I did not get a check that time from Broder.

I did not at any time get a check from Broder.

I did not get a check for $75. I got a check for $79, though.

Q. On Sunday you told Broder your mortgage was to be foreclosed on Monday?

A. No, sir, I didn't tell him it was to be foreclosed on Monday. It was being foreclosed, I only had been threatened, got a letter of foreclosure, but there wasn't anything startling.

The procedures in foreclosure had been begun.

90 Q. What was the conversation between you and Broder on Sunday afternoon in Wagner's store, or at any other place?

A. At the time he told me he is going to come up the next day and see me in my office, that is all.

I did have a talk with him about how much money I needed. I told him I needed about $2,000. And he said, "I think I will be able to help you out."

I say it *it* was about half past nine o'clock Monday he came into my place.

Q. Wasn't there something in that rather alarming that a man would walk into your place at nine or half past nine o'clock Monday morning and hand you two checks, one for $660 and one for $1,200?

A. For the first moment I thought he was connected with the firm.

There was nothing alarming in that.

That did not scare me a bit.

Q. You know the banks do not open until nine o'clock?

A. He could write out checks before that.

Q. Did you think that check—look at that check—did you think that check was in the handwriting of Broder?

A. I never saw his writing.

Q. Did you think, when you got that check, it was in the handwriting of Broder?

A. I did not know.

Q. Or you know it was not?

A. I don't know.

Q. Did you understand the back, the endorsement, to be in the handwriting of Broder?

A. I never saw his handwriting.

I never saw him write at any time.

I testified I got a letter from him from the Tombs.

91 I took this $660 check and the $1,200 check and went immediately over to the lawyer that day.

I did not endorse it before I got to the lawyer's office.

Q. How long have you been doing business with checks, or had you been doing business with checks, prior to this time?

A. A good many years.

I am in business 14 or 15 years.

I knew if I had a check that was worth while at all, I would endorse it.

Q. Why did you go into the lawyer's office with these two checks without having endorsed them?

A. I thought that would be time enough in his office.

I heard Holzopfel testify I did not endorse these checks until after he told me he would not take them until after I endorsed them.

After writing out the receipt he said these checks are not endorsed. I said, "All right, I will endorse them."

He did ask me to endorse them.

After he gave the receipt he turned the checks on the other side and saw they were not endorsed, he said, "You better endorse these checks."

Q. Didn't you say, "Here are two checks uncertified for the purpose of paying off this mortgage." And he said, "Where did you get them?"

A. No, he didn't ask me where I got them. I told him a friend of mine loaned me that money to pay that mortgage.

Q. Did you hear him testify yesterday that you said Furman & Company gave you them?

A. No, Holzopfel must have forgotten that I told him a friend of mine gave me these checks.

92 I wouldn't say he tells a falsehood.

That check is drawn on Indianapolis, Indiana.

I did know that at the time I handed it to him, that check from Indiana.

I took it from Broder Monday.

And I know it came from Indiana.

It was nine or half past nine in the morning.

And Sunday noon he told me he would get this money.

And Monday morning he came in with these checks and I took those checks to my lawyer.

I did not receive a telephone call from Mr. Holzopfel on Monday.

Q. When did you receive a telephone call from him?

A. He wrote me a letter.

I got the letter about Wednesday after I gave him these checks.

I got the letter Wednesday.

I got the checks back I believe the same day.

No; Wednesday.

He told me to call for the checks, that the bank will not accept them for deposit, only for collection, and he would not leave them that way, he wants me to take them back and raise cash.

Q. He told you he didn't like the endorsements on the back?

A. He didn't not say that.

Q. Didn't he tell you the bank would not take the checks because they were made out to a firm, M. Furman & Company, and it was signed M. Furman, not a proper endorsement?

A. No, he said the bank will not accept them for deposit, only collection.

He did not tell me why.

I didn't hear any reason why the checks were not good. I telephoned my wife and told her to take the receipt back and bring the checks to my office.

93 And then I saw Broder about the checks.

And Broder tore one of the checks up.

That was immediately after the checks came back and were in my possession.

And he took the $1,200 check from me and tore it up.

And after he tore up that $1,200 check I still handed this check over to Falk to cash.

Q. How long after that did you find out from Falk that this check was no good?

A. The following Tuesday.

Q. On what day was it he told you he was connected with this firm, Broder?

A. He never told me he was connected with the firm. He told me he was dealing in postage stamps.

Q. Because you saw a lot of postage?

A. I saw? I never saw any postage stamps. He told me he was dealing with different postage stamps, that was his business.

Q. Dealing with different postage stamps?

A. Yes.

Q. If that is so, isn't that check made out to a millinery company? Does that sound like a postage stamp company?

A. I don't know.

It was about Thursday, this $1,200 check was torn up.

Of that week.

On Tuesday he came to me and brought me some more checks.

Q. And that was after Holzopfel told you the checks were no good?

A. No, that was not after, that was between those two days, between Monday and Wednesday.

Q. Was it Wednesday he came?

A. No, between Monday and Wednesday, I think the following day he brought me a few more checks.

94 That was all the checks I got from him, except the $300 one.

Q. I asked you to look at this check dated September 17th, look at the back of it. When did you get that check?

A. That was about the same time, either Tuesday or Wednesday.

Q. Why, the 13th is the date of the first check and that is dated the 17th?

A. It might be written on the 17th, but it didn't come to my possession on the 17th.

Q. What day did you get it?

A. I don't know, it was the same week, I don't know what day it was.

Q. Did that look like a stamp company, the Monarch Specialty Company?

A. Of course not, I don't know.

Q. Then he told you Mr. Furman was a friend of his?

A. He didn't tell me.

Q. He testified yesterday that he told you Furman was a friend of his?

A. I did not say that.

Q. You said you thought he was connected with that firm, Furman & Company?

A. Yes, but not a friend of his.

Q. You thought he was connected with the firm of Furman & Company?

A. Yes, after he had three checks drawn on that firm.

I got three checks on that firm.

Q. Did you think he was connected with the Monarch Specialty Company?

A. He could not be if he was with Furman, but I took the check.

I did not think he was connected with the Union Pleating Company.

I took the check about the same time.

Q. Did you think he was connected with the Clover Hat Company?

A. No, but you get checks from different people and they come to one party.

95 Q. I ask you to look at the back of that check, Union Pleating Works, look at the signature of it, the endorsement on it. I ask you to look at the endorsement of this check of M. Furman & Company. Are not those endorsements written in the same handwriting?

A. I don't know.

Q. You say you have been doing business with banks for 14 years and handling checks?

A. Yes, but I am not a judge of writing. I am a poor writer myself.

I am not a judge.

Q. I ask you to examine the signature on the back of that and tell us whether they look alike?

A. I don't know. They are different written.

Q. I ask you to look at that and ask you if that is like it?

A. It seems to me everyone is written differently. I don't know.

Q. I show you that Clover Hat Company there. Don't you notice the strong similarity on all those in the handwriting?

Mr. McManus: I object, calls for expert testimony.
The Court: He can tell how it looks to him.
Mr. McManus: Exception.

Q. Look at the endorsement on that?
A. I am sure I don't know.
I know this man's name was Broder.
Broder's name is not written on any of these checks.
Q. Why didn't you get Broder to sign those checks?
A. Seeing that they were already endorsed I did not ask him to sign his name to it.

96 I saw they were endorsed and I did not ask him to sign his name to them.

Q. When the man came back, Mr. Ireland as you say, came to you with this check for $10.85?
A. Mr. Ireland did not come with this check. A girl from the Union Pleating Works called me up first and asked me if I had given to M. Fisher & Sons a check for $10.85. I told them yes.
Q. When Mr. Ireland came to you he came to you about this check on the Clover Hat Company, $24.30?
A. Yes.
Q. Did you hear Mr. Ireland say yesterday you told him you cashed that check for a customer?
A. The chances are I might have told him that.
I don't remember what I told him.
That was after Broder was arrested.
Q. That was when you said to this man you cashed this check for a man who was a customer?
A. It was at the time when the girl called me up about the $10.85 check, that I told him the other check I expected will be no good and I will make it good. At that time this check did not come back.
After Broder was arrested and in jail, Mr. Ireland came to me for his money on this.
I gave him $10 on account and later $12 on account.
Q. And when you talked with him at that time, you told him you cashed these checks for a customer?
A. I don't remember what I told him.
I did not tell him the man who gave me these checks was locked up in jail.

97 Q. It was not true, then, if you told him that, was?
A. No.

Q. You got this check of September 14th, $312.05, and you gave that check to Joseph Falk, you say?
A. I did not.
I did not give this check to Joseph Falk.
This check for $79.40 on the Monarch Specialty Company, I gave to Cumner, Jones & Company.
I got this check either Tuesday or Wednesday.
I got it before the date is due on the check.

Q. You want us to believe you got this check before the 17th of September?

A. Mr. Beer, I cannot recall the date I got it. That week I got it from either the 13th until the 20th. It was the only week I had transactions with Broder.

I gave it to Cummer Jones. I don't recall the date.

Q. When did you get the $45.86 cash from Cummer Jones?

A. At the time when I gave them the check, Mr. McCall sent his check in the bank for the difference. I told him I have no bank account, and he sent his check to his bank and sent me the money in the afternoon or that same day.

Q. I show you this check, Boston, September 21, 1915. Pay to the order of F. E. McCall, $47.86, and ask you to look at it. Wasn't it after that date you got the check from McCall?

A. After that?

No, before McCall gave me his private check out of his own pocket.

Q. Then it was about ten days later that McCall called you up and told you the check was no good?

A. I don't know. I heard him testify yesterday it was
98 ten days after he gave me his personal check he found out it was bad?

That was about three days later and the check came back from Boston. He came to my office and spoke to me.

Q. And that is the first time you knew the check was bad?

A. I knew before these checks would be bad. I knew the week following when Falk told me that Broder could not produce M. Furman. I suspected these checks would be no good.

Q. When was it that Falk told you these checks were no good and a forgery?

A. About Tuesday, the following week.

Q. It was Tuesday, the following week?

A. One day Broder told me Furman is in Philadelphia. Possibly will be back Thursday or Friday. After that when Broder could not produce Furman I suspected these checks would be no good.

Q. In answer to a question by your counsel, "Why did you take those checks after the other checks came back.

A. I took $2,000 or $2,100 to cover the mortgage because I knew I would have the money from the life insurance to make it good."

Q. When did you pay Cummer Jones this $47.50 or $47.60?

A. It wasn't the $47, it was the whole amount of the whole check I paid back. I gave McCall a forty dollar check immediately and I told him the balance I will pay as soon as I can.

Q. You didn't pay him the whole bill then?

A. I did not. I could not.

That was ten days after the 21st of September. Ten days after. Many of these checks are those checks I returned, so that
99 will be the best answer. I gave McCall my personal check. That was after Broder was arrested.

When Falk told me the check was a forgery I did not notify the police.

Q. Did you tell anybody at this time these checks you were passing with the other checks you had given out were all forgeries?

A. I did not want to make trouble for anybody.

Q. Now, when you got this check for $312 you said, "I sent a line to Monarch Specialty Company"?

A. Not Monarch Specialty Company; to Samstag & Hilder.

I told him I—you have the letter, Inspector Jacobs showed me that letter at the time I was called as a witness. I wrote this letter, I acknowledged it.

This letter you show me is in my handwriting.

Q. That is not such bad handwriting?

A. I don't know, I ought to write much better than that.

Q. You testified a few minutes ago, you did not write good?

A. Well, it is not good handwriting.

Q. How long have you been examining checks during your 14 years of business?

A. What do you mean, "examining"?

Q. How long have you been dealing with checks all the 14 years of business?

A. Not exactly all.

I have been handling checks about 12 years.

This is my own handwriting.

And this is the check I sent that back with this.

I don't know what day I sent that back on.

It was after I learned from Falk that I had suspicions about these checks.

100 Q. Was it after Broder was arrested?

A. I don't know.

Q. So you wrote this to Samstag & Hilder?

A. Yes.

Mr. Beer: I offer it in evidence.

Mr. McManus: I object, incompetent, irrelevant and immaterial.

The Court: Admitted.

Mr. McManus: Exception.

(Marked Exhibit 10 in evidence.)

Q. You wrote this to Samstag, Hilder: "Enclosed please find check of $312 which I found, and am returning it to you. A poor but honest man."

A. That is what I wrote.

Q. You said you found that check?

A. Yes.

I didn't sign my name to this note.

I said I went to the jail and I talked with Broder.

I didn't tell him I wanted $500.

Q. But you went to the Century Bank and got a check and came back to the prison and handed it to Broder for his signature?

A. I handed him a blank check. He offered, the first day when I came to see him, he said: "I will help you out. I will give you $500. Bring me a check from the Century Bank."

Q. After you knew Broder was arrested and charged with the forgery of these checks, you went to the Tombs and was ready to take another check from him for $500.

A. Mr. McManus called me down as a damn fool for doing it.

Q. Mr. McManus did?

A. Yes.

Redirect examination.

By Mr. McManus:

These are some of the checks I used to pay back some of these items.

101 Q. They are receipts you received for payment of some of these items?

A. They are the checks I paid back and part money. Those are the checks, different checks I paid back.

The Court: When did you begin to have a bank account?

The Witness: 1902.

The Court: How *it is* you did not present these checks from Broder to your own account?

The Witness: I did not have a bank account again at that time.

Q. How long did you have a bank account up to the time of the Broder transaction?

A. About three months prior to that my bank account, the bank notified me I should withdraw it.

Because it did not warrant them I should have an account.

It was too small; although I paid a dollar a month to carry it.

I took it out about three months before this.

I resumed with the bank account the 1st of October, 1915.

So that at the time of these transactions I had no bank account.

Q. Where did you open the bank account in October, 1915? Was it the Sherman National Bank?

A. Sherman National Bank.

Q. Where did you get the money with which you opened that account?

A. My uncle gave me $250 towards that house at the end of September.

Q. Where did you get the rest of it?

A. And on the 1st of October a customer happened to be

102 in my place when he overheard the matter, and a customer from San Antonio gave me $200. I had $200 in cash and I opened the account with $500.

Mr. McManus: I offer it in evidence.

Mr. Beer: I object, it is self laudatory.

The Court: They corroborate what was said.

Mr. Beer: After the man was arrested he opened his bank account.

The Court: They tend to corroborate his claim that he paid these back.

Q. Was this receipt a receipt you received from Max Falk.

For $15.
In full of returned check for $107 dated October 15th, 1915?
A. Yes.

JOHN H. COTTER, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct examination.

By Mr. McManus:

I am a physician.
In active practice in Brooklyn at 252 Havemeyer street.
I know this defendant.
I have known him about ten years.
I know other people that know him.
Q. Are you a member of the same association together? Are you a member of any organization together?
A. No.
103 Q. Do you know what his reputation is in the community for honesty?
A. Yes, I never heard anything wrong about it.
Q. Is it good or bad?
A. Always good.

CHARLES B. MILBANK called as a witness on behalf of the defendant and duly sworn, testified as follows:

Mr. Beer: I will concede all these men subpœnaed here will testify that they never knew anything about this man's actions, and that they will testify to his good character.
The Court: You had better put the evidence in.

Direct examination.

By Mr. McManus:

I have not been subpœnaed to come here.
I came voluntarily.
I am an importer of woolens, English and Scotch, at 320 Broadway.
I know this defendant for 14 or 15 years. I knew him when he worked for O'Reilly, before he started in for himself. I have sold him goods since.
Q. Do you know what his reputation is for honesty and integrity?
A. Absolutely.
Q. What is it?
A. Good.

Cross-examination.

By Mr. Beer:

Q. Who was the last person you spoke to about this man's honesty?
A. Mr. Pakas.

104 Q. Pakas himself?
A. Yes, when he told me he was in trouble.
Q. Then you told him, "You are an honest man"?

Mr. McManus: I don't think that is a proper question.
The Court: I do.

A. No, I told him I would testify as to his honesty.
Q. All you know about him is because you have had business transactions with him?
A. I have been in charge of credits of our firm over twenty years, and I looked up his credit before he opened an account, and know how he has stood or stands, or stood up to this trouble. I have not looked him up recently with woolen and trimming houses he did business with.
Q. Did you ever talk to anybody about this man's reputation for truth and veracity?
A. I never had reason to.

Redirect examination.

By Mr. McManus:

As a credit man it is my business to look into the reputation of people I deal with as to their truth and honesty.
Q. Can you do business if you do not find out their reputation for truth and honesty?
A. No, I bank on their honesty. I trust an honest man with money, but if he is crooked I would not do business with him.

105 JACOB WOLF, being called as a witness on behalf of the defendant and duly sworn, testified as follows:

Direct examination.

By Mr. McManus:

I live at 560 West 144th street.
My business is insurance broker.
I know the defendant, Victor Pakas.
I have known him fifteen or sixteen years.
We are members of the same association together.
I know other people that know him.
Q. How many people do you know, about, that know him in this same association?
A. Possibly 200.
Q. Do you know what his reputation is in the community for honesty and integrity?

Mr. Beer: He says he does not live in the community.
Mr. McManus: I mean in New York.

Q. Do you know what his reputation is?
A. I have always thought him a respectable man.

The Court: That is not the question. His general reputation. What other people think about him.

The Witness: Supposed to be good.

106 DAVID A. TRIER, being called as a witness in behalf of the defendant and duly sworn, testified as follows:

Direct examination.

By Mr. McManus:

I am in business with Consolidated Gas Company, New York City, for 28 years.

I know this defendant.

I know other people that know him.

His general reputation among the people I know for honesty and integrity is good.

Q. You have known him how many years?

A. The same as Mr. Wolf, about 15 or 16 years.

PAUL MOSS, being called as a witness on behalf of the defendant and duly sworn, testified as follows:

Direct examination.

By Mr. McManus:

I am connected with B. S. Moss, cloth examiners and shrinkers, and B. S. Moss, theatrical people, New York City.

I know Mr. Pakas for 14 or 15 years.

I know people who know him. My family, three brothers.

Q. Do you know what his reputation is among the people he associates with?

A. Absolutely honest, reliable and trustworthy.

Defendant rests.

Government rests.

Testimony closed.

Mr. McManus: I ask Your Honor to dismiss the indictment and direct a verdict of acquittal upon the grounds set forth at the close of the Government's case.

The Court: Denied.

107 Mr. McManus: Exception. I also move to dismiss the indictment and take the case from the jury or direct a verdict of acquittal, upon the ground that the box or place from which the mail matter was taken was not an authorized depository for mail matter.

The Court: Denied.

Mr. McManus: Exception. Also upon the ground, that upon the whole case it appears the theft in question had occurred after the mail matter in question had left the hands of the Government, and was outside of the control of the Government.

The Court: Denied.
Mr. McManus: Exception.

Charge to the Jury.

GENTLEMEN OF THE JURY: Although we have been trying criminal cases for some time, and I have in each case told you about the presumption of innocence and reasonable doubt, the law requires that you should be charged on these subject-matters in each case, although it has come to be almost a matter of form, I fear.

The fact that the defendant has been indicted and placed on trial should not be taken against him. The fact that the court has refused to direct an acquittal should not be taken against him.

If you can reconcile the evidence on any reasonable basis consistent with the defendant's innocence, you should do so. The
108 law presumes the defendant innocent until he is proven guilty beyond a reasonable doubt. This presumption is evidence to be weighed and considered by you in his behalf until you reach your final verdict. You cannot find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt. A reasonable doubt does not mean a fancied doubt, but it means a doubt based on reason, and which is reasonable in view of all the evidence. If, after an impartial consideration of all the evidence you can candidly say you are not satisfied of the defendant's guilt, you have a reasonable doubt and you should find him not guilty; but, if after such impartial consideration of all the evidence you can candidly say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in important matters of your own, you have no reasonable doubt, and you should find him guilty.

As to the credibility of witnesses and the weight to be given to their testimony. The credibility of the witnesses and the weight to be given to their testimony are questions entirely for your consideration and determination. The law is that you are not bound to give the same weight to the testimony of each witness, but you should give their testimony such weight as you think it is fairly entitled to receive, after considering their appearance upon the stand; their candor or lack of candor; their feelings or bias, if any; their interest in the result of the trial, if any; their means of information, and the reasonableness of the testimony which they give.

109 As to the defendant's testimony. The defendant has testified in his own behalf, and in considering and weighing his testimony, the law is that you should take into consideration his interest in the result of the trial and all the circumstances surrounding him, and give his testimony just such weight as you think it is fairly entitled to receive—no more or no less—but just what it weighs out.

As to the weight to be given to the testimony of an accomplice. It is claimed that the witness Broder was an accomplice. This is admitted by him as well as by the Government. It is safer to consider the testimony of an accomplice with caution, and scrutinize it with care, and before you give such testimony full credit you should com-

pare it with the other testimony in the case for the purpose of ascertaining whether it is corroborated, although it is for you to determine how much weight you will give the testimony of an accomplice, whether it is corroborated or not. If you find that his testimony is sufficiently corroborated so you are justified in giving it full credit, you should treat it accordingly. It is all a question for you to consider and determine.

As to the offense charged. By a statute of the United States, it is made unlawful for a person to steal a letter from any authorized depository for United States mail matter, or to abstract or remove from such a letter any article or thing contained therein. By the same statute it is also made unlawful for a person to receive any such letter, or any article or thing contained therein, knowing the same to have been so stolen or abstracted.

110 The defendant is charged in two indictments with violating this statute. In one of the indictments he is charged with receiving one check, and in the other he is charged with receiving three checks, but your verdict will be guilty on each of the indictments if you find he received one or more of the checks therein described. You should consider each indictment separately, and your verdict will be guilty or not guilty on each indictment as you find the facts to be, that is, we have two cases being tried at one time.

If you find that Samuel Broder stole the checks described in these indictments from the United States mail, as his testimony tends to show, and that the defendant received them from him knowing that they had been so stolen from the mail, you will find the defendant guilty. You notice there are two things necessary for you to find in order to find the defendant guilty. If you find that Samuel Broder stole the checks described in these indictments from the United States mail, as his testimony tends to show, and that the defendant received them from him knowing that they had been so stolen from the mail, you will find the defendant guilty. If you fail to find that Broder stole the checks described in the indictments from the mail, or that the defendant knew that the checks had been stolen from the mail at the time he received them from Broder, as his testimony tends to show, then you will find him not guilty.

You will apply what I have said to each of the indictments, and to each of the checks described in the indictments. I think I have made this simple and plain to you.

111 I think as long as I have not described the checks described in the indictments, you had better take the indictments.

Mr. McManus: I respectfully except to their taking the indictments. I have no objection to the checks.

The Court: Why the indictments have not been read in the hearing of the jury, and I have not specifically pointed out the checks described, and under those circumstances, I think I will allow them to take the indictments and then they can see which is described.

Mr. McManus: Exception.

Mr. McManus: I ask your Honor to charge the jury that evidence of good character may tend to create a reasonable doubt where otherwise no reasonable doubt might exist?

The Court: I have left the jury to decide the guilt or innocence on all the evidence in the case. The jury will consider that evidence of good character for what they think it is worth.

Mr. McManus: I respectfully except to your Honor's refusal to charge in the language requested.

The Court: I have charged in substance as you requested.

Mr. McManus: I think the rule is, just as I have stated. It is, I know it to be the case.

The Court: The Court is not obliged to adopt the language of counsel.

Mr. McManus: That is the reason I took an exception; when the Court does not charge as I have stated. I may be wrong, but I don't think I am.

112 The Court: Haven't I covered that in substance?

Mr. McManus: I think that modifies my statement and that is the reason I ask an exception.

The Court: Repeat it.

Mr. McManus: I respectfully ask the Court to charge the jury that evidence of good character may tend to create a reasonable doubt where otherwise no reasonable doubt might exist?

The Court: I will say that to you gentlemen. It is for you to determine the weight, and you are to decide this case on all the evidence given you in court, and the law as given by the Court.

Mr. McManus: I ask your Honor to charge that they are not bound by any statement of facts made by counsel; that their own memory of facts is what must control?

The Court: They know that. That is the rule.

The Court: They may take the indictments. If they want the exhibits they may take them. I will put it this way as long as there is an exception: If you want the indictments and the exhibits you may have them.

The Foreman of the Jury: We had better take the checks along, and that order of the Post Office Department, and the indictments also.

The Court: And the indictments also.

Jury Retired.

Verdict Guilty.

113 Mr. McManus: I move to set aside the verdict on the ground that it is against the weight of evidence.

The Court: Denied.

Mr. McManus: Exception.

Mr. McManus: I also ask that the verdict be set aside on the ground that the place the mail matter was taken from was not an authorized depository for mail matter, and on the further ground that the theft occurred after the mail in question left the possession of the Government.

The Court: Denied.

Mr. McManus: Exception.

Government's Exhibit 1-*a*.

No. 47135.

New York,

Sept. 21, 1915.

The Importers & Traders National Bank of New York.

1-53.

Pay to the order of American Garter Co. $22 65/100 Twenty two & 65/100 Dollars Through The New York Clearing House Association.

TADROSS & ACKRAY.

[On left margin:] Tadross and Ackray, 79 Washington St.

(Endorsement:) American Garter Co. Beny Greenberg. 43 B'way. U. S. District Court, E. D. of New York. U. S. v. Pakas.

114 *Exhibit* 1*A for Identification.*

Dated June 21:16.

P. G. B. GILKES, *Clerk.*

Government's Exhibit 1*b*.

No. 854.

New York,

Sep. 28, 1915.

The Bank of United States. 1–277.

Pay to the order of The Model Underwear Co. Inc. $15 56 Fifteen 56/xx Dollars.

SAML. SCHLOSBERG.

2746.

(Endorsement:) The Model Underwear Co. Inc. U. S. Dist. Court. E. D. of New York v. Pakas.

Exhibit 1*B for Identification.*

Dated June 21, 1916.

P. G. B. GILKES, *Clerk.*

115 *Government's Exhibit* 1C.

No. —.

Flushing, N. Y. City,
Sep. 16, 1915.

1-427.

Bank of Long Island, at Flushing.

Pay to the order of S. Fried $24 74/100 Twenty Four 74/100 Dollars.

MAX ABRAMSON.

(Endorsement:) Sol. Fried, U. S. District Court, E. D. of New York. U. S. v. Pakas.

Exhibit 1C *for Identification.*

Dated June 21/16.

P. G. B. GILKES, *Clerk.*

Government's Exhibit 2.

Falmley and McCrea Millinery Co.

Wholesale Millinery.

No. 34249.

Indianapolis,
Ind., 9/8/1915.

Pay to the order of M. Furman & Co. $660.80 Six hundred and sixty 80/ Dollars.
To the Merchants National Bank, Indianapolis, Ind.

FALMLEY & McCREA MILLINERY COMPANY,
By FRED FALMLEY, *Prest.*

(Endorsement:) M. Furman & Co. V. Pakas. Pay Columbia Bank or order. Jacob Falk.

116 Pay to the order of any National Bank, State Bank or Bankers or Trust Company. Prior Endorsement Guaranteed. Columbia Bank, New York. W. S. Griffith, Cashier.

Government's Exhibit 3.

No. 5658.

New York,
9/10, 1915.

The Pacific Bank,

470 Broadway.

Pay to the order of M. Furman & Co. One hundred & seven & 10 Dollars.
$107 10/xxx.

CORNELIUS STACE.

(Endorsement:) M. Furman & Co. V. Pakas. Pay Columbia Bank or order. Max Falk & Sons.
Received payment Through N. Y. Clearing House Sep. 13, 1915. Prior Endorsement Guaranteed Columbia Bank.

117 *Government's Exhibit* 4.

New York,
Sep. 13, 1915.

No. 3275.

The National Park Bank of New York.

Pay to the order of Union Pleating Works $10 85 Ten and 85/100 Dollars.

THE FRANCIS T. WITTE
HARDWARE CO.,
Per FRANCIS T. WITTE, *Ps.*

(Endorsement:) Union Pleating Wks. 3 Pay to the order 3. 1 The Corn Exchange Bank, N. Y. 1. 5 M. Fisher Sons & Co. 5. Pay any bank, Banker or Trust Company or order. The Corn Exchange Bank, N. Y. Endorsement Guaranteed. 1-45. Sep. 16, 1916. 1-45. 6-5th-6. Received payment Through New York Clearing House. 1-45. Sep. 16, 1915. 1-45. Endorsement Guaranteed. The Corn Exchange Bank. 6-5th Ave. 6.

118 *Government's Exhibit 5.*

Samstag & Hilder Bros.

To the Essex County National Bank Newark N. J.:

New York,
Sep. 14, 1915.

No. 2944.

Pay to the order of Monarch Spec. Manfg. Co. 434 Broome St. City, $312 05 Three Hundred Twelve Dollars Five cents. *Dollars.*

SAMSTAG & HIDER.
——— ———, *Pres.*

(Endorsement:) Monarch Specialty Mfg. Co.

Government's Exhibit 6.

Charles D. Levy.

Wholesale Dry Goods.

This check is in payment in full of the within account and the payee accept it as such by endorsement hereon. If incorrect return check with the memorandum of exception.

Date.	Particular.	Amount.
9/7/	10 %	27.00
		2.70
		24.30

Findlay, Ohio,
Sept. 15, 1915.

No. 499.

Pay to the order of Clover Hat Co. $24.30 Twenty four Dollars Thirty Cent- *Dollars.*

To The American National Bank Findlay, Ohio.

Clover Hat Co.

3 Pay to the Order of 3
1 The Corn Exchange Bank, N. Y. 1
5 M. Fisher Sons & Co. 5
First National Bank, Findlay, Ohio.
Paid
Sept. 8, 1915.
American National Bank
Findlay, O.
Pay to the Order of
Any Bank or Banker
Prior Endorsement Guaranteed.

36. Sep. 27, 1915.
The Union National Bank
C. 15. Cleveland, Ohio. C. 15.
W. G. Saunders, Cashier.
Endorsement Cancelled.

119 *Government's Exhibit 7.*

New York,
Sept. 17, 1915.

No. 91023.

The Second National Bank, 1-63.
of the City of New York.

Pay to the order of The Monarch Specialty Co. $79.40. Not over eighty dollars. Seventy nine 40/100 Dollars.
F. R. ARNOLD & CO.,
Per DAN. H. ARNOLD, *Atty.*

[On left margin:] F. R. Arnold & Co. 72 West 22nd Street.

(Endorsement:) The Monarch Specialty Mfg. Co. Pay to Cumner Jones Co. V. Pakas. Pay to the Order of Boylston National Bank, Boston, Mass. Cumner Jones Company Received payment Through New York Clearing House, Sep. 21, 1915. The Citizens' Central National Bank of New York.

120 *Defendant's Exhibit A.*

At a Court of General Session of the Peace of the City and County of New York, Holden in and for the County of New York, at the Building for Criminal Courts in the Borough of Manhattan of the said City, on Wednesday, the 28th Day of January, in the Year One Thousand Nine Hundred and Fifteen.

Present: The Honorable Charles C. Nott, J., Judge of the Court of General Sessions, Justice.

THE PEOPLE OF THE STATE OF NEW YORK,

against

SAMUEL BRODER.

On conviction by confession of forgery in the Second Degree.

The Court being satisfied that the said Samuel Broder is 18 years of age, and has not been prev-ously committed and sentenced for a felony.

Whereupon it is Ordered and Adjudged by the Court that the said Samuel Broder for the Felony aforesaid, whereof he is convicted, be imprisoned in the New York State Reformatory, at Elmira, then to be dealt with according to law.

A true extract from the Minutes.

[SEAL.] EDWARD R. CARROLL,
Clerk of Court.

Stamp.

121 Court of General Sessions of the Peace, County of New York.

Court of General Sessions of the Peace, County of New York.

THE PEOPLE OF THE STATE, etc.,

against

S. B.

January 28, 1914.

Copy of sentence to N. Y. State Reformatory at Elmira, N. Y.

Stipulation as to Case.

United States District Court, Eastern District of New York.

UNITED STATES OF AMERICA, Plaintiff,

against

VICTOR PAKAS, Defendant.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of said District Court in the above-entitled matter as agreed on by the parties.

Dated N. Y., Sept. 15, 1916.

OLCOTT, GRUBER, BONYNGE & McMANUS,
Attorneys for Plaintiff in Error.

MELVILLE J. FRANCE,
Attorney for Defendant in Error.

122 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, Percy G. B. Gilkes, Clerk of the District Court of the United States of America for the Eastern District of New York, do hereby certify, that the foregoing is a true copy of the transcript of the record on appeal as agreed upon by the parties on file and remaining of record in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed at the Borough of Brooklyn, in the Eastern District of New York, this Second day of October in the year of our Lord one thousand nine hundred and sixteen.

PERCY G. B. GILKES, *Clerk*,
By J. G. COCHRAN, *Deputy Clerk*.

The foregoing case and exception is hereby settled and ordered on file as the settled case and bill of exception in the foregoing case for use in the certification of a record on appeal in lieu of the original papers on file.

HARLAND B. HOWE,
U. S. D. J.

123 United States Circuit Court of Appeals for the Second Circuit.

VICTOR PAKAS, Plaintiff-in-error,

against

UNITED STATES OF AMERICA, Defendant-in-error.

Before Coxe, Rogers and Hough, Circuit Judges.
Olcott, Gruber, Bonynge & McManus, Attorneys for Plaintiff-in-Error.
Terence J. McManus, Harold Riegelman, Of Counsel.
Melville J. France, United States Attorney.
Henry Ward Beer, Assistant United States Attorney.

This cause comes here on writ of error to the United States District Court for the Eastern District of New York.

ROGERS, *Circuit Judge:*

The plaintiff-in-error, hereinafter called defendant, has been convicted under an indictment charging him and one Samuel Broder at various times between August 30, 1915, and September 30, 1915, with knowingly, wilfully, unlawfully and feloniously buying and receiving certain specified checks taken from certain mail matter

which had been previously stolen from mail which had been
124 deposited in the mail of the United States.

Broder pleaded guilty to the indictment and became a witness for the Government. It appears that the defendant in September 1915, was in desperate need of money, as a mortgage upon his home was about to be foreclosed. He was in conversation about the matter with a friend of his, one Wagner, and was informed by the latter of depredations upon the mails of the United States that Broder was committing for him. The suggestion was made that Broder could help him out; and Broder agreed to steal the checks to help defendant pay off the mortgage and was to receive in return $100 and an overcoat and suit of clothes. Broder in accordance with this agreement stole from letter boxes the mail, opened the same in defendant's presence, took a number of checks and forged the endorsements in the presence of the defendant to whom he gave them. The defendant was shown to have paid over checks so received for the purpose of paying off a second mortgage on the house in which he lived and that he had passed off forged checks to other parties which were shown to have been taken by Broder from private letter boxes in the City of New York.

Section 194 of the Criminal Code Act of March 4, 1909, provides as follows:

"Whoever shall steal, take or abstract, or by fraud or deception obtain, from or out of any mail, post-office, or station thereof, or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag or mail or shall abstract or remove from any such letter, package, bag or mail any article or thing contained therein, or shall secrete, embezzle, or destroy any such letter, postal card, package, bag or mail, or any article or thing contained therein; or whoever shall buy, receive, or conceal, or aid in buying, receiving or concealing, or shall unlawfully have in his possession, any letter, postal card, package, bag or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described,
125 knowing the same to have been so stolen, taken, embezzled, or abstracted; or whoever shall take any letter, postal card, or package, out of any post-office or station thereof, or out of any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post-office or station thereof, or other authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it has been directed, with a design to obstruct the correspondence, or to pry into the business or secrets of another, or shall open, secrete, embezzle or destroy the same, shall be fined not more than two thousand dollars, or imprisoned not more than five years, or both."

By virtue of the above provision it is clear that if defendant had in his possession checks which had been stolen from mail out of "any authorized depository" knowing the same to have been so stolen, he ha committed the crime with which he was charged and is subject to the punishment prescribed by the Act.

It is claimed, however, that the District Court was without juris-

diction as the box from which the mail is alleged to have been taken was a private depository and was not within the terms of the Criminal Code. We are urged to hold that boxes privately owned and controlled and placed in buildings for the reception of mail matter from carriers and for the convenience of the persons to whom the mail is addressed, cannot be regarded as "authorized depositories."

Order No. 8571 of the Post Office Department, issued January 7, 1915, provides as follows:

"Any letter box or other receptacle intended or used for the receipt or delivery of mail matter on any said delivery route, rural delivery route, state routes or other mail route is hereby designated a letter box for the receipt or delivery of mail matter within the meaning of the Act of March 4, 1909."

But it is said that the above order was without effect upon the character of receiving boxes privately owned as such boxes are beyond the scope of Departmental authority. And our at-
126 tention is called to section 161 of the Revised Statutes (U. S. Comp. St. 1901, p. 80) which provides as follows:

"The head of each department is authorized to prescribe requirements, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution of its business, and the custody, use and preservation of the records, papers and property appertaining to it."

It is said that the power of the Postmaster General is ministerial in its character, and that he cannot by an executive order extend the application of a penal law and make that a crime which was no crime before.

This is very interesting and would be unanswerable if the Postmaster General was undertaking on his own authority to enact a criminal law. We do not think he has done so. What he has done is to determine what shall be regarded as a depository for mail. And when he did that the depository so designated became an "authorized depository," a depository authorized by the Post Office Department as a receptacle for the receipt or delivery of mail matter. Mail matter while continuing as such is "property" appertaining to the Post Office Department, and the Postmaster General is authorized by the statute to prescribe requirements not inconsistent with law for its custody and preservation. This he has done and nothing more.

It cannot be denied that the mail is "property" and that it belongs for certain purposes to the United States. Every common carrier has a special property in what he carries. And in Searight v. Stokes, 3 How. 151, 169 (1845) the Supreme Court speaking through Chief Justice Taney said:

"The United States have unquestionably a property in the mails. They are not mere common carriers, but a government, performing a high official duty in holding and guarding its own
127 property as well as that of its citizens committed to its care; for a very large portion of the letters and packages conveyed on this road, especially during the session of Congress, consists of

communications to or from the officers of the executive department, or members of the legislature, on public service or in relation to matter of public concern."

In that case the court construing the Acts of Congress ceding to Pennsylvania the part of Cumberland road which is within that state, and the acts of Pennsylvania accepting the surrender, decided that a carriage whenever it is carrying the mail must be held to be ladened with the property of the United States, and consequently exempted from the payment of tolls.

In United States v. Grimaud, 220 U. S. 506 (1910) the defendants were indicted for grazing on the Sierra Forest Reserve without having obtained the permission required by the regulations prescribed by the Secretary of Agriculture. They demurred on the ground that the Forest Reserve Act of 1891 was unconstitutional in that it delegated to the Secretary of Agriculture power to establish regulations concerning the use of such forest reservations and made a violation thereof a penal offense. The Supreme Court reversed the lower court and held the demurrers should have been overruled. It admitted that Congress could not delegate legislative power, but held that authority to make administrative rules was not a delegation of legislative power and that such rules were not raised from an administrative to a legislative character because the violation thereof was punished as a public offense.

Congress had full power to legislate concerning the mail. In ex parte Jackson, 96 U. S. 727 (1878) the court speaking through Mr. Justice Field said:

"The power vested in Congress 'to establish post-offices and post-roads' has been practically construed since the foundation of
128 the government, to authorize not merely the designation of the routes over which the mail shall be carried, and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents."

And that statement of the law was repeated in In re Rapier, 143 U. S. 110, 133 (1892).

Section 161 of the Revised Statutes (U. S. Comp. St. 1901, p. 80) came under review in the Circuit Court of Appeals in the Eighth Circuit in Lewis Publishing Company v. Wyman, 182 Fed. 13 (1910). The court held that under that section the Postmaster General was authorized to limit the number of sample copies a publisher could send out at a certain rate of postage under the Act of March 3, 1885. That Act did not specifically limit the number of sample copies that might be sent out at the pound rate, and it was claimed that as the Act did not do so the Department could not do so. The court speaking through Judge Hook said:

"We think that under the authority conferred by Congress upon the head of the department to prescribe regulations not inconsistent with law for the performance of its business, the Postmaster General may lawfully impose such a limitation. The act of Congress does not purport to grant an unlimited privilege as to sample copies,

and its very generality and indefiniteness invites a supplementary regulation. It is not necessary to the validity of a departmental regulation that specific statutory authority for it be discovered. It would be impracticable to set forth in the statutes all the rules for the conduct of the business of the great executive departments of the government, and Congress has wisely confined itself to marking general outlines and imposing general limitations, leaving the subordinate and supplemental details suggested by practical experience to be prescribed by the heads of the departments. A departmental regulation must not be inconsistent with the statutes, but it may be by way of execution or supplement."

It is of the utmost importance that the immense and valuable correspondence entrusted to the Government should be most
129 carefully and scrupulously guarded during the whole period which must elapse from the time it leaves the possession of the senders until it reaches the hands of those who are entitled to receive it. That the Government has full power to protect it by its laws is not to be doubted. If it had not done so it would not have performed its duty to the country. If it is important that mail deposited in public mail boxes owned by the Government should be safe guarded against thieves, it is equally important that mail deposited in private boxes attached to residences or to apartment houses or along road sides in rural sections of the country should be protected by the Federal authority. And it is our opinion that mail placed in such depositories is protected by the law which Congress has enacted.

These authorized depositories of mail are provided for the convenience of the carriers. The Post Office Department even imposes it as a duty upon the recipients of mail in those sections of the country where there is a free rural delivery to provide along the highway private boxes for the receipt of the mail. In section 824 of the Postal Laws and Regulations it is prescribed that "Persons desiring rural delivery service shall provide and erect at their own expense boxes conforming to official specifications and requirements." It is not to be supposed that the Government having made it compulsory to furnish such depositories is without the power to protect the mail when it is deposited therein, or that it has failed to exercise its right to protect it against the depredations of the criminal classes. To require the mail to be deposited in such places and then leave
130 it there unprotected would convert these depositories into mere provocatives to plunder.

On the trial of the case Broder who had pleaded guilty to the offense charged in the indictment was called as a witness by the prosecution. It appeared that he had been sentenced on January 28, 1914, for more than one year's imprisonment in the Elmira State Reformatory upon a conviction for burglary in the second degree. The record of that conviction was produced in open court, and counsel for defendant objected to his testifying on the ground that he had been convicted of an infamous crime. The common law excluded the testimony of a person who had been convicted of an infamous crime. And as Congress has passed no act changing the rule

of the common law as to the competency of witnesses in criminal cases in the courts of the United States except in special instances not including or material to the class of cases to which this belongs, it is urged that the admission of Broder's testimony was plainly error for which the conviction should be set aside. It is too late to raise that question in this court. We passed upon the question in Rosen v. Wagner, decided at this term and not yet reported. In its facts it is similar to this. In that case Judge Coxe said:

"The tendency of modern thought is towards the abolition of the archaic rules which undertook to declare, arbitrarily, who were and who were not entitled to credence as witnesses and who should be absolutely debarred from taking the stand. All this is changed and now in most enlightened and progressive jurisdictions the tendency is to receive all the testimony bearing upon the issue, irrespective of the character of the witness who gives it. Proof of the commission of a crime discredits a witness but it does not absolutely exclude him from the witness stand."

To that decision we adhere. In Brown v. United States 233 Fed. 353 (1915) the question came before the Circuit Court of
131 Appeals in the Sixth Circuit, and that court held that as the federal courts are courts of an entirely different sovereignty and are wholly independent of the states, a conviction of an infamous crime in the state court rendering the person incompetent to testify in the state court does not render him incompetent to testify in the federal courts any more than it would in the courts of a foreign jurisdiction, for the federal courts, while following the state laws, do not give effect to a conviction by a state court. We are in full accord with that decision and hold that no error was committed in the admission of the testimony of Broder.

Judgment affirmed.

132 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Victor Pakas against United States of America (Copy.) Opinion. Rogers, Circuit Judge.

133 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court-rooms in the Post Office Building in the City of New York, on the 16th day of February, One Thousand Nine Hundred and Seventeen.

Present: Hon. Alfred C. Coxe, Hon. Henry Wade Rogers, Hon. Charles M. Hough, Circuit Judges.

VICTOR PAKAS, Plaintiff in Error,

v.

THE UNITED STATES, Defendant in Error.

Error to the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

A. C. C.

134 Endorsed: United States Circuit Court of Appeals, Second Circuit.

Victor Pakas v. U. S. Order for mandate.

United States Circuit Court of Appeals, Second Circuit. Filed Feb. 16, 1917. William Parkin, Clerk.

135 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 134 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Victor Pakas against United States as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 2d day of March in the year of our Lord One Thousand Nine Hundred and Seventeen and of the Independence of the said United States the One Hundred and forty-first.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

136 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Victor Pakas is plaintiff in error, and The United States of

America is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the
137 United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

itness the Honorable Edward D. White, Chief Justice of the United States, the seventeenth day of April, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 25819. Supreme Court of the United States, October Term, 1916. No. 989.
Victor Pakas vs. The United States. Writ of Certiorari.
United States Circuit Court of Appeals, Second Circuit. Filed Apr. 30, 1917. William Parkin, Clerk.

138 In the Supreme Court of the United States, October Term, 1916.

No. 989.

VICTOR PAKAS, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent.

A certified copy of the transcript of the record herein, including all the proceedings in the United States Circuit Court of Appeals, for the Second Circuit, having been filed as an exhibit to the petition for a writ of certiorari, directing said Circuit Court of Appeals to certify the whole record and cause herein to this court for its consideration, and said petition having been granted and allowed, and a return dated the 17th day of April, 1917, having issued, pursuant to said petition,

It is hereby stipulated and consented, that said certified copy of the transcript of the record, including all proceedings in the said Circuit Court of Appeals, be deemed a full and complete return to said writ.

Dated April 19, 1917.

JNO. W. DAVIS,
Solicitor General.
TERENCE J. McMANUS,
Attorney for Petitioner.

Endorsed: Supreme Court of the U. S. October Term 1916. No. 989. Victor Pakas, Petitioner, against The United States of America, Respondent. Stipulation. Olcott, Gruber, Bonynge & McManus, attorneys for petitioner, 170 Broadway, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 30, 1917. William Parkin, Clerk.

139 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed, and certified as a return to the writ of certiorari issued herein.

Dated New York, May 1st, 1917.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

140 [Endorsed:] 989–25819. United States Circuit Court of Appeals, Second Circuit.
Victor Pakas v. U. S. Return to Certiorari.

141 [Endorsed:] File No 25819. Supreme Court U. S., October term, 1916. Term No. 989.
Victor Pakas, Petitioner, vs. The United States. Writ of certiorari and return. Filed May 11, 1917.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THEODORE S. ROSEN AND ABRAHAM WAGNER, PETITIONERS,
v.
THE UNITED STATES. } No. 365.

VICTOR PAKAS, PETITIONER,
v.
THE UNITED STATES, } No. 438.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and respectfully moves the court to advance the above-entitled causes for joint hearing on a day convenient to the court.

In No. 365 petitioners were convicted in the District Court of the United States for the Eastern District of New York on an indictment charging them and one Samuel Broder with a conspiracy to commit an offense against the United States, to wit, to buy, receive, etc., certain checks which had been stolen from the United States mails knowing the same to

have been so stolen, in violation of section 37 of the Criminal Code. Broder pleaded guilty. Sentences of eighteen months and one year and one day in the Federal penitentiary at Atlanta, Ga., were imposed upon petitioners, respectively. They are now at large on bail.

At the trial, Broder, who had been convicted on his own confession of forgery in the second degree in the State courts of New York, testified on behalf of the Government over petitioners' objection as to his competency.

In No. 438 petitioner was convicted in the same District Court on an indictment charging him and the said Broder referred to in No. 365 with buying, receiving, etc., certain checks which had been stolen from the mails knowing the same to have been so stolen, in violation of section 194 of the Criminal Code. Broder pleaded guilty. Petitioner was sentenced to the Federal penitentiary at Atlanta, Ga., for one year and one day, and is now at large on bail.

At this trial Broder also testified on behalf of the Government over petitioner's objection as to his competency.

The principal question presented in both cases is—

> Does a judgment of conviction in the State courts for forgery render a person incompetent as a witness in the Federal courts?

and therefore both cases can be disposed of readily in one argument.

Prompt enforcement of the criminal laws and some doubt obtaining in the lower Federal courts as to what is the proper rule on the subject are reasons rendering an early determination of the question by this court desirable.

Notice of this motion has been served on opposing counsel in both cases.

JOHN W. DAVIS,
Solicitor General.

SEPTEMBER, 1917.

FILED
JAN 15 1917
JAMES D. MAHER
CLERK

No. 8[redacted]365

Supreme Court of the United States.

THEODORE S. ROSEN AND ABRAHAM WAGNER,
Plaintiffs-in-Error,
Petitioners

against

UNITED STATES OF AMERICA,
Defendant-in-Error,
Respondent.

PAPERS ON APPLICATION FOR WRIT OF CERTIORARI.

MEIER STEINBRINK,
Attorney for Petitioners Theodore S. Rosen,
215 Montague Street,
Brooklyn, New York.

DICK & FREEDMAN,
Attorneys for Petitioner Abraham Wagner,
215 Montague Street,
Brooklyn, New York.

MELVILLE J. FRANCE,
UNITED STATES DISTRICT ATTORNEY,
Attorney for Respondent,
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Brooklyn, New York.

The Boerum Printing Press, Inc., 215 Pearl St., N. Y.

SUBJECT INDEX.

	PAGE
Notice of Application	1
Petition for Writ	2
Brief in support of Petition	5

CASES CITED.

Classen, *In re*, 140 U. S. 205	17
Fitzpatrick *v.* U. S., 178 U. S. 307	17
Good Shot *v.* U. S., 154 Fed. 258	17
Machin *v.* U. S., 117 U. S. 351	17
Maxey *v.* U. S., 207 Fed. 327	6, 14
People *v.* Park, 41 N. Y. 21	18
U. S. *v.* Gwynne, 209 Fed. 993	6
U. S. v. Hollis, 42 Fed. 248	15
Wilson, *Ex Parte*, 114 U. S. 417	15, 17

Supreme Court of the United States,

OCTOBER TERM, 1916.

No.

THEODORE S. ROSEN and ABRAHAM WAGNER,
Plaintiffs-in-Error,
Petitioners,

AGAINST

UNITED STATES OF AMERICA,
Defendant-in-Error,
Respondent.

SIR:

PLEASE TAKE NOTICE that upon a certified copy of the record in the above cause, the annexed petition, of which a copy is herewith served upon you, and the annexed brief, of which a copy is also herewith served upon you, I shall apply to the Supreme Court of the United States at Washington, District of Columbia, on the 29th day of January, 1917, at the opening of the Court, or as soon thereafter as counsel can be heard, for a writ of *certiorari* in conformity with the prayers of the petitioners.

Dated, Brooklyn, N. Y., January 8, 1917.

Yours etc.,

MEIER STEINBRINK,
Attorney for Petitioner Rosen,
Office & P. O. Address,
215 Montague Street,
Borough of Brooklyn,
City of New York.

~~DICK & FRIEDMAN,~~
~~Attorneys for Petitioner Wagner,~~
~~Office & P. O. Address,~~
~~215 Montague Street,~~
~~Borough of Brooklyn,~~
~~City of New York.~~

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. .

THEODORE S. ROSEN and ABRAHAM WAGNER,
Plaintiffs-in-Error,
Petitioners,

AGAINST

UNITED STATES OF AMERICA,
Defendant-in-Error,
Respondent.

Petition for Writ of Certiorari.

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of Theodore S. Rosen and Abraham Wagner, plaintiffs-in error, respectfully shows to this Court:

I. This is a petition for a writ of *certiorari* to review a final decision of the United States Circuit Court of Appeals for the Second Circuit affirming by a *divided vote*, a judgment of the United States District Court of the Eastern District of New York in a criminal proceeding, Circuit Judge Ward voting for a reversal, and Circuit Court Judges Coxe and Hough voting for an affirmance. The conflicting opinions of these respective judges are contained in the record (fols. 75–92).

II. The question of law involved here is the competency of a certain class of witnesses in any action or proceeding in the Federal Courts.

III. The salient facts are thus stated in the majority Opinion:

> "On the trial of Rosen and Wagner, indicted for tampering with the United States mail, a witness named Broder was called by the Government. He was jointly indicted with Rosen and Wagner and pleaded guilty. The record of his conviction in the General Sessions of New York of the crime of forgery in the second degree was offered in evidence. Objection was taken by defendants to Broder's competency as a witness, but it was overruled. Was Broder a competent witness?"

WARD, *J.*, held that the question should be answered in the negative and the judgment reversed. His opinion is based not only on a logical review of the historical foundations of our criminal jurisprudence, but also, on the further ground, that the United States Circuit Court of Appeals for the Eighth Circuit arrived at the same conclusion upon the identical question in *Maxey* vs. *United States*, 207 Fed. Rep. 327.

III. The majority opinion cites no case, but virtually legislates a new rule of evidence.

IV. Thus there is a most important question which has frequently arisen and is very likely frequently to arise in the various Federal Courts, left entirely in doubt. As shown, there is a direct conflict in the decisions of the Eighth and Second Circuits. Furthermore, this case directly raises the all important question of the respective jurisdictions of Congress and the Federal Courts, as is shown in the concluding sentences of Judge Ward's opinion.

WHEREFORE, your petitioners pray that this Honorable Court shall cause a writ of *certiorari* to be issued, pursuant to the power vested in this Court by the Judicial Code of the United States requiring

said United States Circuit Court of Appeals for the Second Circuit to certify the whole record and cause to this Court for its consideration and that thereon this Court will decide the matter in controversy in in favor of the plaintiffs-in-error and petitioners herein. And your petitioners will ever pray.

Signed THEODORE S. ROSEN,
" ABRAHAM WAGNER.

STATE OF NEW YORK,
~~Southern~~ Eastern District of New York, } ss.:

THEODORE S. ROSEN and ABRAHAM WAGNER, being duly sworn, say that they are the plaintiffs-in-error and petitioners in the above entitled proceeding; that the foregoing petition is true to their own knowledge, except as to the matters therein stated to be on information and belief, and as to those they believe it to be true.

The petition is made in good faith and not for the purpose of delay.

THEODORE S. ROSEN.
ABRAHAM WAGNER.

Sworn to before me this 11th day of January, 1917.

Andrew G. Beekman
Notary Public, ~~Kings~~ Bronx County

I ~~We~~ hereby certify that I ~~we~~ have examined the foregoing petition and in ~~my~~ opinion it is well founded and is entitled to the favorable consideration of this Court.

MEIER STEINBRINK.
~~DICK & FREEDMAN.~~

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. .

THEODORE S. ROSEN and ABRAHAM WAGNER,
Plaintiffs-in-Error,
Petitioners,

AGAINST

UNITED STATES OF AMERICA,
Defendant-in-Error,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Undisputed Facts.

The appellants, together with one Broder, were jointly indicted. They were charged with the violation of Sections 37-194 of the Criminal Code, tampering with the United States mail (fols. 5-12)

Thereafter the indictment was severed as to Broder and the case continued against the appellants (fol. 17).

Upon the ensuing trial against Rosen and Wagner, the Government called as its witness Broder, the former co-defendant (fol. 24).

Promptly, vigorously and repeatedly counsel for the defense challenged the competency of this witness (fols. 24, 25, 39-41).

At the very outset and without any objection by

the District Attorney, the Court received in evidence a certified copy of the judgment of the Court of General Sessions of the Peace of the City and County of New York (fols. 24, 46–48). That showed that in 1914 the witness Broder was there convicted of a felony, forgery in the second degree, and for that felony was sentenced to imprisonment in the New York State Reformatory at Elmira.

Appellants' objections were overruled and exceptions thereto were taken. The bill of exceptions shows "The testimony of Broder was material and comprised the major part of the testimony offered by the Government" (fol. 42). And the jury's verdict carried the recommendation of mercy for both appellants (fol. 19).

POINT I.

The decision of the Circuit Court is Erroneous.

(1) See Opinion of Ward, *J.*

(2) *Maxey* vs. *United States*, 207 Fed. Rep. 327.

The opinion in full follows.

CARLAND, Circuit Judge·

"Maxey and one Henry B. Copeland were indicted for conspiring to commit an offense against the United States; the offense being the devising of a scheme to defraud by carrying on a correspondence through the mails. Maxey, having been tried and convicted, brings error.

(1) The following appears from the bill of exceptions: 'The United States, to maintain the issues upon its part, introduced as witnesses, first, H. B.

Copeland, but the defendant objected to his competency, stating that at the Trial Term, 1912, of said Court he had been convicted of a felony and sentenced to fifteen months in the penitentiary at Atlanta, Ga., and offering the record of his conviction and sentence. The Court overruled the objection, stating that that did not disqualify him, and defendant at the time excepted. Whereupon said Copeland testified as follows'.

This ruling of the Court is assigned as error, and as Copeland was a co conspirator of Maxey, and a witness without whose testimony no conviction could have been had, it is important that this ruling be carefully considered. The record of the conviction and sentence of Copeland does not appear in the record. The record, however, does show that such record was offered, and in view of the fact that the Court made no point that the record did not show the facts to prove which it was offered, but ruled that the facts shown did not disqualify the witness, it cannot now be objected that the record of the conviction and sentence of Copeland does not appear in the record before us.

(2) The competency of witnesses to testify in criminal cases in the Courts of the United States is determined by the common law, except where Congress in special cases may otherwise provide (*Logan* vs. *United States*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429). The Supreme Court in the case cited had under consideration Section 858, R. S. U. S. (U. S. Comp. St. 1901, p. 659), and after full consideration determined that the provision of that section reading as follows:

> 'In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the Courts of the United States in trials at common law, and in equity and admiralty'—

referred to civil cases only, and in so deciding used the following language:

> 'and the section above quoted was merely intended to confer on the courts of the United States the jurisdiction necessary to enable them to administer the laws of the states. But it could not be supposed, without very plain words to show it, that Congress intended to give to the states the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would in fact place the criminal jurisprudence of one sovereignty under the control of another. It is evident that such could not be the design of this act of Congress'. 'The law by which, in the opinion of this Court, the admissibility of testimony in criminal cases must be determined is the law of the state, as it was when the courts of the United States were established by the judiciary act of 1789 [Act Sept. 24, 1789, c. 20, 1 Stat. 73]'. 'The courts of the United States have uniformly acted upon this construction of these acts of Congress, and has thus been sanctioned by a practise of sixty years.' *United States* vs. *Reid*, 12 How. 361, 363, 366 [13 L. Ed. 1023] * * *
>
> 'For the reason above stated, the provision of Section 858 of the Revised Statutes that "the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty", has no application to criminal trials; and therefore the competency of witnesses in criminal trials in the courts of the United States held within the state of Texas is not governed by a statute of the state which was first enacted in 1858 but, except so far as Congress has made specific provisions upon the subject, is governed by the common law, which, as has been seen, was the law of Texas before the passage of that statute and at the time of the admission of Texas into the Union as a state.'

Section 858 was amended June 29, 1906 (Act June 29, 1906, c. 3608, 34 Stat. at L. 618 [U. S. Comp. St. Supp. 1911, p. 271]), so as to read as follows:

> 'Section 858. The competency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which the court is held.'

It thus appears that there has been no legislation by Congress changing the rule of the common law as to the competency of witnesses in criminal cases in the courts of the United States except in special instances not material in this case. It was not until March 16, 1878 (Act March 16, 1878, c. 37, 20 Stat. at L. 30 [U. S. Comp. St. 1901, p. 660]), that persons charged with a crime in the courts of the United States were made competent witnesses in their own behalf. Thus for nearly a century the common law disqualification obtained as to persons charged with crime. In the rapid march of events we often forget that we did not always possess the liberties that we now enjoy. As another illustration of the change in the common law rule of evidence, we may refer to the act of Congress approved February 26, 1913, which provides as follows:

> 'In any proceeding before a court or judicial officer of the United States where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, Court, or officer conducting such proceeding, to prove or disprove such genuineness.'

It will be seen that this law changes the common law rule in regard to the comparison of writings where the genuineness of the handwriting of any person may be involved. The rule of the common law would not permit a comparison of handwriting

unless the writing to be compared was properly in the case for other purposes than mere comparison (*Withaup* vs. *U. S.*, 127 Fed. 530, 62 C. C. A. 328).

If we are to look to the common law of Arkansas where the trial was had, we learn that the disqualification of infamy which arose from the conviction of crime at common law has not been removed by statute in that State, except partially in civil cases (*Werner* vs. *State*, 44 Ark. 122). We do not cite this case on the assumption that the Legislature of Arkansas has any power to provide what the rules of evidence shall be in criminal cases in the courts of the United States but simply to show what the common law is in the jurisdiction where the trial was had.

(3) Counsel for Maxey, at the time he objected to the competency of Copeland as a witness, stated that the witness had been convicted of a felony and offered the record of his conviction and sentence. We think it is perfectly fair to assume that the record showed that the crime for which Copeland was convicted and sentenced was a felony, as there seems to have been no objection made upon that ground. We are not confined to this view of the matter, however, as counsel stated that Copeland had been sentenced to fifteen months in the Penitentiary at Atlanta, Ga. Section 335 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. at L. 1152 [U. S. Comp. St. Supp. 1911, p. 1687]) reads as follows:

> 'All offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed as felonies. All other offenses shall be deemed misdemeanors.'

We are obliged to assume, therefore, that the crime of which Copeland was convicted and sentenced was a felony.

(4, 5) And we will now proceed to inquire whether this conviction and sentence rendered Copeland in famous and therefore disqualified him as a witness under the rule of the common law.

In *Ex Parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89, Mr. Justice Gray, in delivering the opinion of the Court holding that an offense punishable by confinement in the penitentiary at hard labor was an infamous offense within the meaning of the Fifth Amendment, said:

> 'Mr. William Eden (afterward Lord Auckland) in his Principles of Penal Law, which passed through three editions in England and at least one in Ireland within six years before the Declaration of Independence, observed: 'There are two kinds of infamy: the one founded in the opinions of the people respecting the mode of punishment; the other in the construction of law respecting the future credibility of the delinquent', Eden's Principles of Penal Law, c. 7, Section 5.
>
> 'At that time it was already established law that the infamy which disqualified a convict to be a witness depended upon the character of his crime and not upon the nature of his punishment. *Pendock* vs. *McKinder, Willes*, 665, Gilb. Ev. 143; 2 Hawk c. 46, Section 102; *The King* vs. *Priddle*, 1 Leach (4th Ed.) 442. The disqualification to testify appears to have been limited to those adjudged guilty of treason, felony, forgery, and crimes injuriously affecting by falsehood and fraud the administration of justice, such as perjury, subordination of perjury, suppression of testimony by bribery, conspiring to accuse one of crime, or to procure the absence of a witness, and not to have been extended to cases of private cheats, such as the obtaining of goods by false pretenses or the uttering of counterfeit coin or forged securities. 1 Greenl. Ev., Section 373; *Etley* vs. *Merrick*, 11 Metc. [Mass.] 302; *Fox* vs. *Ohio*, 5 How. 410, 433, 434 [12 L. Ed. 213] * * *
>
> 'The remaining question to be considered is

> whether imprisonment at hard labor for a term of years is an infamous punishment. * * *
>
> 'For more than a century the imprisonment at hard labor in the state prison or penitentiary or other similar institution has been considered as infamous punishment in England and America.'

In *Mackin* vs. *United States*, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909, *Ex parte Wilson*, *supra*, was followed.

Here we have a witness shown to have been convicted and sentenced for a felony to which an infamous punishment was attached. The question now presented for decision is: Was Copeland disqualified as a witness under the rule of the common law? The crimes, a conviction and punishment for which would disqualify a witness at common law, are generally enumerated as follows: Treason, felony and the *crimen falsi*.

(6) The *crimen falsi* of the common law not only involved the charge of falsehood but also is one which may injuriously affect the administration of justice by the introduction of falsehood and fraud *Greenl. Ev.*, Section 373; *Wigmore on Evidence*, Vol. 1, Section 519, 520. In a note to Section 620, *Wigmore on Evidence*, Mr. Wigmore says:

> ' This topic, being practically almost obsolete and destined soon to become entirely so, may be here sufficiently expounded by quoting the words of Professor Greenleaf, which so served to guide our courts in their rulings from 1842.'

We are not unmindful that the trend of modern opinion, so far as the disqualifications of witnesses are concerned, is toward removing the disqualifications and permitting the jury to weigh the testimony of the witnesses in connection with their character and antecedents; but this Court has no

power to remove the disqualifications of the common law, the power to do so being with Congress.

It is urged in the brief of counsel for the United States that Congress has passed no law making the conviction of crime a disqualification. This is an erroneous view to take of the matter. The common law prevails until Congress shall decide otherwise. The courts of the United States were organized and their jurisdiction defined, but the matter of the competency of witnesses has never been legislated upon by Congress except as to civil cases, and there is no rule upon the subject unless we go to the common law. Other errors have been assigned, but as they will probably not arise again we do not deem it necessary to consider them.

We think the Court erred in permitting Copeland to testify and the judgment of conviction is therefore reversed and a new trial ordered."

POINT II.

The great weight of authority is not in accord with the majority opinion.

Is a person who had been convicted in the State of New York of a felony, forgery in the second degree, and who was sentenced to imprisonment in the State Reformatory of Elmira, thereafter competent to testify in any criminal trial held at the Federal Courts in the same State?

In answering this question it must be borne in mind that:

1. the judgment of conviction was not reversed;

2. no pardon was ever granted;

3. the ruling of the lower court was made upon the sole ground that a sentence to Elmira is equivalent to a suspension of sentence. No other ground was either urged or adopted;

4. indeed, the Court expressly assured the defense that by the severance of the indictment, the challenged witness Broder could not be regarded as a co-defendant, "Because the man is not on trial and has no more to do with this particular trial than if he happened to be under arrest for an altogether different crime" (fol. 27).

The judgment is unjust because it is polluted by the testimony of a convicted forger, an incompetent witness under the common law.

The competency of witnesses in criminal cases in the United States Courts is determined by the common law of the State as it existed when the Federal Courts were established by the Judiciary Act of 1789. Hence, the logical query must be, what was the status of a forger at that time?

The answer in Wharton's Am. Criminal Law, Vol. 1, page 552, and Bishop's Crim. Law, Vol. 1, page 588, is that forgery was an infamous crime at common law disqualifying a witness.

Therefore, the lower courts were bound by these conclusions in the history of our jurisprudence. Inferences, speculations and distinctions may not be raised against time honored authority. No argument was made below that Congressional enactments altered the law, nor are we aware of any such provision. The Court's attention was then (fol. 27) respectfully directed to the recent case of *Maxey* vs. *U. S.*, 207 Fed. 327, which deals with the precise point involved here.

The principles and reasoning there employed were adopted on a similar question in the later case of *U. S.* vs. *Gwynne*, 209 Fed. 993.

But one case will suffice to illustrate how closely the United States Courts adhered in the past to the common law of competency of witnesses.

U. S. vs. *Hollis*, 42 Fed. 248, decided in 1890.

There the defendant on trial for perjury was called as a witness in his own behalf. The District Attorney objected, producing the record of his conviction for an infamous crime, making him incompetent. His evidence was excluded.

In the case at bar the witness Broder was not only afflicted with the judgment of conviction, but was still further tainted morally with another plea of guilty on the indictment of the United States (fol. 36).

Recalling the philosophy of the common law governing incompetency ("Whosoever hath a conscience impervious to truth, his lips shall not touch the fountain of justice"), it is startling to behold Broder's transformation into snowy white purity and thereby encompass the ruin of two innocent men, especially when the jury itself pleaded for mercy.

Unjust is the judgment to the appellants in particular, and revolutionary is the law therein towards the community in general.

The ruling of the Court is unsound upon other grounds.

The question of competency was determined by lifting the curtain of settled law and gazing at the measure of punishment. This was a mistaken conception, for several reasons:

1. At common law the infamy which disqualified a convict as a witness depended upon the character of his crime, and not upon the nature of his punishment (Greenleaf's Evidence, Section 372, Note 3).

Ex parte Wilson, 114 U. S. 417.

2. Even adopting that mode of reaching a conclusion one necessarily must ascertain the common law punishment for forgery. So great an authority as Stephen's History of Criminal Law in England (Vol. 3, page 181) says:

> "In 1562 was passed the Statute 5, Elizabeth C. 14, relating to the forging of deeds, wills and charters. The punishment was 'to pay double costs and damages and * * * shall be set upon the pillory in some open market town or other open place and there to have both his ears cut off, and also his nostrils to be split and cut and seared with a hot iron so they may remain for a perpetual note or mark of his falsehood.'"

The offender was also to forfeit to the Queen the issues and profits of his land for life and to suffer perpetual imprisonment for his life.

> "If the forged document was any obligation or bill obligatory * * * or other things personal, the offender was to lose one of his ears and to be imprisoned for a year. * * * This Act was afterwards superseded by others which made many forgeries capital; but it remained nominally in force till 1830 when it was repealed. The law as to forgery was not, I think, altered by statute in the Seventeenth Century but all through the Eighteenth Century the great increase in trade which then occurred was accompanied by a corresponding increase in the severity of the laws relating to forgery. * * * No part of the criminal law of the latter part of the Eighteenth Century was more severe in itself, or was executed with greater severity than this."

3. Apparently Judges Coxe and Hough overlooked the lower rungs in the ladder of the development of the criminal law. That rule is, that the determination of the question of infamy rests upon what the Statute provides and not what the Judge imposes; in short, a crime punishable by imprison-

ment in a state prison or penitentary is an infamous crime, whether or not the accused is sentenced to hard labor. The leading case on this question is

In re Classen, 140 U. S. 205.

To the same effect are

Fitzpatrick vs. *U. S.*, 178 U. S. 307;
Mackin vs. *U. S.*, 117 U. S. 351;
Ex Parte Wilson, 114 U. S. 423;
Good Shot vs. *U. S.*, 154 Fed. 258.

Consequently, even testing Broder's conviction under this principle he is guilty of an infamous crime. The New York Statute declares his crime a felony which may be punishable by imprisonment in a state prison for ten years (Section 88, Penal Law).

Wholly irrelevant and immaterial therefore is any reference to the Elmira Reformatory.

4. Moreover, recent Federal legislation plainly required that Broder be deemed a felon. Section 335 of the Criminal Code provides this basis for differentiation in the grades of crimes:

> "All felonies which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors."

5. Nor can we find any provision in the numerous statutes relating to the Elmira Reformatory making it mandatory for any Judge to send a criminal there. The option is with the Judge. Therefore, under the Classen case (*supra*), the argument advanced by the Court below is absolutely untenable, because it is not a suspension of sentence. Surely, no Court may assume as a matter of fact that a

penal institution is in reality not so, when the record contains not an iota of evidence in this case.

6. Lastly, the majority opinion erroneously asserted that there is no precedent.

But a precedent there is, directly in point.

People vs. *Park*, 41 N. Y. 21 (1864): In that case a witness in a criminal trial was challenged because he had been convicted of third degree burglary, while an infant, and under the then statute of juvenile delinquency, was sentenced to the House of Refuge instead of State Prison. The Court held that the witness was a felon guilty of an infamous crime and incompetent to testify. The Court said at page 24:

> "Burglary in the third degree is a felony, within the statutory definition of that term; and in the view above taken it does not lose that character because the convict is under sixteen years of age. As illustrated by counsel it would be an absurdity that a conviction on Monday, for burglary previously committed would not be a felony, which would be a felony had the jury delayed their verdict till the next day, when the convict had been over sixteen years of age. * * * In making provision subsequently for ameliorating the punishment of juvenile delinquents, the legislature did not intend thereby to repeal, modify or limit the statutory definition of felony. * * * His admission as a witness was error for which the General Term properly reversed the conviction."

POINT III.

Congress, not the Court, may change the law of competency of witnesses.

1. See Judge Ward's Opinion (fols. 86–92).

2. Analogous to the endeavor on the part of the lower court to disregard the settled law of the United States, by permitting a felon to testify in the case at bar, was the attempt to disregard the statutes of the United States in the recent case of *Ex Parte* United States, decided by this Court on December 4th, 1916. In that case it was pointed out that the District Court had no power to suspend sentence where the Statute of the United States provided a specific penalty.

On page 13 of the Opinion, this Court said:

> "and so far as the future is concerned, that is, the causing of the imposition of penalties as fixed to be the subject, by probation legislation or such other means as the legislative mind may devise, to such judicial discretion as may be adequate to enable courts to meet by the exercise of an enlarged but wise discretion the infinite variations which may be presented to them for judgment, recourse must be had to Congress whose legislative power on the subject is in the very nature of things adequately complete."

Even though the trend of modern opinion may be toward the qualification of felons sentenced to a probationary institution or a reformatory, it is not within the power of the Court to disregard the law. Legislative enactment, removing such qualifications, is the proper remedy. The Court's jurisdiction should not infringe on the power of Congress.

It may well be concluded in this case, as in *Ex Parte U. S., supra,* "recourse must be had to Congress whose legislative power on the subject is in the very nature of things adequately complete."

CONCLUSION.

The writ of certiorari should be granted, because:

1. There is a conflict of opinion between the Circuit Courts on an important question which constantly springs up in the various courts of the United States and, therefore, requires a determination by this Court to settle the law.

2. The Court's ruling is not in accord with the weight of authority.

3. In the absence of Congressional enactments in this branch of the law, no iconoclastic innovation or judicial legislation should be sanctioned.

Respectfully submitted,

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Office Supreme Court, U. S.
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Supreme Court of the United States,

OCTOBER TERM, 1916.

NO. 868. 365

THEODORE S. ROSEN and ABRAHAM WAGNER,
Petitioners,

vs.

THE UNITED STATES.

BRIEF OF PETITIONERS

ON APPEAL AFTER ALLOWANCE OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FROM THE SECOND CIRCUIT.

Petition for certiorari filed January 15, 1917.
Certiorari and return filed April 3, 1917.

Stillman Appellate Printing Co., 51 Broad St., N. Y.

Supreme Court

OF THE UNITED STATES.

THEODORE S. ROSEN and Abraham Wagner, Plaintiffs-in-Error, (Defendants below), against UNITED STATES OF AMERICA, Defendants-in-Error, (Plaintiff below).	October Term, 1916. No. 868.

BRIEF FOR THE PLAINTIFFS-IN-ERROR.

The plaintiffs-in-error, the defendants in this criminal action, appeal pursuant to a writ of *certiorari* granted by this Court (page 18), and directed to the United States Circuit Court of Appeals for the Second Circuit. That Court affirmed, by a divided vote, the conviction of these appellants, after a trial before the District Court and a jury, in the Eastern District of New York.

There is only one question in the case, and that is a question of law, namely, the competency of a witness for the Government, and it does not require a decision as to the facts.

Statement of the Case.

The appellants and one Broder were jointly indicted for a crime (page 2), and were brought to trial before the said District Court, whereupon the indictment was severed as to Broder, and the trial of the appellants proceeded. Thereafter, and during that trial, Broder (who had pleaded guilty, page 4), was called by the Government as its witness. Immediately, and before he was sworn, due objection was made to his competency to testify, on the ground that he had been convicted of a felony in the State of New York, and was, therefore, disqualified from testifying in a Federal Court, because the common law rule as to the competency of witnesses who had been convicted of a felony had not been altered by Congress and was the law in New York in 1789. Counsel for the appellants then offered in evidence, and it was received without objection, a certified copy of the judgment of the Court of General Sessions of the Peace of the City and County of New York (page 9), showing that in 1914 Broder was there convicted of a felony (forgery in the second degree), and was sentenced therefor to imprisonment in the New York State Reformatory at Elmira. This objection was overruled after a discussion between Court and counsel as to the law; the appellants took proper exception (pages 5 to 7), and Broder was then sworn and testified. The objection was duly repeated during his testimony, but the Court adhered to its ruling and the appellants duly excepted. The appellants were found guilty by the jury, and they then appealed to the United States Circuit Court, where

the conviction was affirmed, Judge Coxe writing an opinion in which Judge Hough concurred, and Judge Ward writing a dissenting opinion (pages 14 and 15).

The Errors Relied Upon.

The errors of the Trial Court, to which due exceptions were taken and which are complained of, and relied on here to obtain a reversal of the judgment of affirmance tendered by the Circuit Court herein, are as follows:

1. In overruling the objection made by the plaintiffs-in-error before Broder was sworn, that he was incompetent to testify because, as was then shown to the Court by uncontradicted proof, he had been convicted of an infamous crime (a felony), in New York, where that Court was sitting and had been sentenced therefor (page 7).

2. In refusing to dismiss the indictment at the end of the Government's case, on the motion of the plaintiffs-in-error made on the ground that a crime had not then been made out (page 8) and on the ground that "without Broder's testimony no crime has been shown" (page 8).

3. In refusing at the end of the trial, to dismiss the indictment on the motions of the plaintiffs-in-error then made as renewals of their previous motions and on the same grounds as were stated at the end of prosecution's case (page 8).

4. In refusing to grant the motions of the plaintiffs-in-error to set aside the verdict of guilty ren-

dered by the jury on the grounds given by them, namely, that "the testimony of Broder was incompetent and that a new trial should be granted" (page 8).

It is conceded that without Broder the case could not even have reached the jury, and the Government admits that "The testimony of Broder was material and comprised the major part of the testimony offered by the Government" (pages 7 and 8). The jury was persuaded by the testimony of this accomplice sufficiently to convict, but not entirely persuaded, because they recommended mercy for both appellants (page 4).

The sole question now presented, therefore, is whether the Trial Court should have received Broder's testimony and should have upheld a conviction based upon it. It was conceded that he had been convicted of a felony, and sentenced, in the State in which that Court was sitting, and it did not appear, and was not claimed or suggested, that the conviction was reversed or that he had been pardoned. Congress has not altered the common law rule as to the competency of witnesses who have been convicted of a felony, and so this appeal really raises the question, "Was Broder disqualified at common law, and by the law of New York in 1789, from testifying because of these admitted facts in his history?"

In support of our claim that he should never have been allowed to speak at that trial, we submit the following argument and authorities.

POINT I.

The common law was that one convicted of an infamous crime was thereafter incompetent to testify as a witness.

It was the contention of the Government below that this proposition was not sound, because an "infamous" punishment was required in addition to conviction for an "infamous" crime, to create the disqualification. We submit that the authorities do not warrant that claim, and that the law is correctly stated in this point.

There was a time when more attention was given to the sentence on the witness, and Baron Gilbert said (Law of Evidence, Vol. 1, 126-127, Ed. 1801), that a disgraceful punishment, such as a pillory whereby the defender became "stigmatized," had once been a separate cause for disqualification, but that now it was not so, because a man might be put in the pillory for a cause that was no blemish on his attestation.

It is true that none of the old English cases include an instance where one who was convicted of a felony, and not given an "infamous" sentence, was held incompetent to testify; the reason is that the English law was famous for always giving an "infamous" punishment for an "infamous" crime. Any case where a convicted felon, in England, did not receive the punishment which the law called "infamous," would indeed be a curiosity, since the rigor and harshness of the English criminal law is well known.

In the 1818 edition (J. H. Thomas) of Coke on Littleton, Vol. 3, page 487, it is said that witnesses were "infamous" if convicted of perjury, forgery or a felony, *or* if the character of their punishment for another crime was such as to make them "infamous."

In Pendock vs. Mackender (2 Wilson, 18), decided in 1755, it was held that one who was convicted of petit larceny was incompetent

> "because it is the crime that makes the infamy and takes away a man's competency, and not the punishment for it, and it is absurd and ridiculous to say that it is the punishment that creates the infamy."

In that case they said that both the crime and the punishment were infamous, but the opinion makes it clear that the infamous crime *alone* disqualified after conviction.

In U. S. vs. Brockius, 24 Fed. cases, 1242 (No. 14,652), cited below by the Government, the crime was assault and battery, which certainly is not, and never was, "infamous," and the Court allowed that person to testify *because there was no "infamous" punishment.* The opinion implies that if the punishment had been "infamous," *although the offense was not*, he might have come within the other of the two common law grounds of disqualification, namely, *punishment by an "infamous" sentence.* The case is certainly not authority for the claim that there could be no disqualification unless there is also an "infamous" punishment on the conviction.

It is true that in "all of the Federal cases re-

ported upon this subject, we find that the excluded witness was one convicted for a felony *and* sentenced to an infamous punishme[illegible]" for the reason that the criminal law in all jurisdictions so resembles the common law that most persons convicted of "infamous" crimes *get punishment that the common law would call "infamous."* That is why these cases do not reveal one instance of an "infamous" crime punished by a sentence not 'infamous."

The Government, however, cannot go further and say that there is anywhere reported a case in which one convicted of a crime "infamous" at common law was allowed to testify as still competent because his punishment was not "infamous."

It appears from the common law cases cited in Blaufus vs. People, 69 N. Y., 107, that conviction for an infamous crime, followed by a *judgment* upon the conviction, created the disqualification, and the disqualification was complete when the judgment of the Court was rendered.

The mere fact that under the common law conviction of an "infamous crime," and the imposition of an "infamous" punishment *always* went together, does not mean that both were required to make one incompetent as a witness, *because he could be incompetent merely because of an "infamous" punishment for a crime that was not "infamous."* There were punishments that were "infamous" beside the pillory, and when imposed they disqualified the witness, *even though his crime was not "infamous."* (*Ex parte* Wilston, 114 U. S., 417, quoting Eden's Principles of Penal Law, Ch. 7, Sec. 5.) This Court said in that case that at the time of

that book it was already established law "that the infamy that disqualified a convicted party as witness depended upon the character of his crime, and not upon the nature of his punishment," citing the English authorities.

See also

Wharton "Am. Crim. Law," Vol. 1, p. 552;
Bishop "Crim. Law," Vol. I, p. 588.

In Butler vs. Petitioners, 17 L. R. A., 764, the authorities were reviewed, and it was held that at common law it was the crime that worked the infamy, and that the purport of all of the decisions of this Court was that if the crime was "infamous," the witness was disqualified, *regardless of what was the punishment.*

See also

United States vs. Yates, 6 Fed., 861;
People vs. Whipple, 9 Cow. N. Y., 708.

In People vs. Parks, 41 N. Y., 21, the proposed witness though convicted of burglary had been sentenced, because of his youth, to the House of Refuge. The Court of Appeals held that he was incompetent because he had been convicted of a felony, and that the mere accident that he was then of an age that gave the Court *discretion* to send him to this House, instead of to the state prison for which his crime made him liable, had no bearing on his qualifications.

POINT II.

Forgery was a felony, and an infamous crime, at common law.

Greenleaf (Sec. 373) enumerates forgery as an "infamous" crime, and Rex vs. Davis, 5 Mod., 75, held that one convicted of forgery was incompetent as a witness, which was also held in State vs. Candler, 10 N. C., 393.

This Court said in *ex parte* Wilson (*supra*), following the authorities, that forgery was one of the infamous crimes, conviction for which disqualified a witness, and Stephens in his "History of the Criminal Law," said (Vol. 3, p. 181) that forgery had extraordinary punishments, and that

> "No part of the criminal law of the latter part of the eighteenth century was more severe in itself or was executed with more severity than this."

POINT III.

The foregoing was the law in force in the State of New York in 1789, when the Judiciary Act was passed.

Forgery "in the second degree," the crime for which Broder was convicted, was forgery at common law. The New York statute, under which he was convicted, merely divides forgery into classes which seem to merit varying degrees of punishment (Con. Laws of N. Y., 1909, Ch. 88, Sec. 888 and 2), but it has not been suggested that this crime was

not forgery as defined by the common law, and therefore, we will not argue that question.

Prior to the year 1829 there is no reference in the statutes of the State or Colony of New York to the subject of competency of witnesses convicted of felony, but in the Revised Statutes of that year (Pt. IV, Ch. 1, T. 7, sec. 23) the common law became the statute, and thereafter "no person sentenced upon a conviction of felony should be competent to testify," unless pardoned, or unless special provision of law existed, *but that if it was not a felony, he should not be disqualified no matter what was the sentence.*

It is clear that the revisers knew that in addition to the common law disqualification, because of the character of the crime then in force, there was formerly a disqualification based entirely on the sentence, where the crime was not infamous. In this way they guarded against disqualifying a witness whose punishment had been "infamous," although his crime had not been. This purpose was later recognized in Carpenter vs. Nixon, 5 Hill., 260.

In People vs. McGloin, 90 N. Y., 241, it was held that both the common law and under New York statute, it was the conviction of a felony that disqualified, and nothing was said about the character of the sentence, or the service of it, being an element of the disqualification.

This rule of the common law, that conviction for an infamous crime was, in and of itself, sufficient to disqualify a witness, being the common law in 1789, and becoming part of the law of New York, is the rule by which the question in this case must be tested.

U. S. vs. Hall, 53 Fed. Rep., 352;
Logan vs. U. S., 144 U. S., 303;
U. S. vs. Reid, 12 How., 361;
Maxey vs. U. S., 207 Fed., 327.

The decision in Brown vs. U. S., 233 Fed., 353, is opposite to the rule established by these cases, but we submit that it is not sound.

POINT IV.

At common law Broder would have been incompetent to testify even though he had received a sentence not infamous.

The Trial Court allowed Broder to testify on the ground that a sentence to Elmira was equivalent to a suspended sentence, and no other ground was suggested, and none has since been urged. It is hard to see how sending him to a state institution where he is deprived of his liberty for an indeterminate period, release dependent on good behavior, and to which he was sent because of his youth and the chance of his reform, is the same as *freeing* him after conviction, and allowing him to remain free during good conduct. If it is possible to say that such a sentence is no sentence at all, this argument loses sight of the established law that it is not the sentence that disqualifies.

We think it is clear that upon his conviction for this "infamous" crime, he would be disqualified at common law, no matter what the punishment was, solely because his crime was "infamous." If it is true that the common law test of disqualification was the infamy of the crime, as distinguished from

the character of the punishment, it follows logically that the disqualification arose so independently of the punishment, that one who was punished so lightly that it was no punishment at all, would still be disqualified. This, after all, is the real question in this case.

If the disqualification depends on the *character* of the punishment, or its *quantity*, some authority must be found that will dispose of the cases cited and the writers mentioned, who unanimously hold that the disqualification follows the conviction for an infamous crime, without also even implying that it is not effected until there is also a punishment that the common law called "infamous." There must also be found an answer to those judges and text writers who go further, and say that the disqualification follows from the "infamous" conviction, and has nothing to do with the sentence, or the punishment.

The common law never had our problem, because it was careful to make the punishment fit the crime, and it matched an "infamous" crime with an "infamous" punishment. It often went further and imposed an "infamous" punishment on some crimes that were not "infamous." Thereupon arose the new, and artificial, ground for disqualification, namely, that the witness had been "stigmatized," and that the law having thus made him contemptible and ridiculous, no case should be spoiled by a use of his testimony. That disqualification soon gave way to common sense, but no one had the courage to suggest to the common law courts that conviction for an "infamous" crime could be talked away, and the authorities make it clear that the

common law judges held, consistently, that if you were convicted of an "infamous" crime that fact alone settled your *status*.

The course of penal legislation in New York has been affected by the charitable desire to deal leniently with those whose infamy was clear, and to introduce more humane punishments for admittedly "infamous" crimes. Felonies have been divided into classes because a lesser degree of infamy was observable in many instances, and the punishment therefor was moderated. This was done by creating "degrees" of forgery, but nothing has been done to suggest that any degree of it has ceased to be "infamous," or that any humanity in the sentence indicates a new opinion about this "infamous" crime.

Broder's sentence was an instance of judicial tenderness towards one who was guilty of an "infamous" crime no matter by what stage of the history of the criminal law you test it, but his minority was in his favor, and earned for him a lesser punishment, based on the hope of his reform. It sought not to increase the infamy of his situation by adding to his conviction a disgraceful and degrading sentence.

The Trial Court, and the Government on its brief below, wholly misunderstanding or ignoring this situation, said that since Elmira Reformatory was not a punishment which the common law would call "infamous," there was not infamy of sentence *and* infamy of crime, and, therefore, there was no disqualification. This is based on the false premise that there must be an "infamous" punishment, and we have shown the common law to be otherwise.

The New York statutes provide that a convicted felon may not register for, or vote at, an election (L. 1901, Ch. 654, sec. 2, sub. 10), but the prohibition shall not apply if he has been committed, on his conviction, to a reformatory (Penal Law, sec. 64), and that if he is between the ages of 16 and 30, and has not been previously convicted of a state prison offense, he may, upon his conviction of a felony, be sent to the Elmira Reformatory, to remain there according to the law governing that Reformatory (Penal Law, sec. 2185). After quoting these statutes, the Government's brief below said, "It thus appears that the witness Broder sentenced to Elmira did not become infamous." We submit that that is a most illogical conclusion and begs the question in this case. The next statement in the brief, "He was not stigmatized," is true, because it is probable that, judged by the common law test, Broder's sentence was not an "infamous" sentence, and he was not thereby "stigmatized."

That has absolutely nothing to do with the point in this case, because as we have shown, an "infamous" punishment, whereby one was "stigmatized," did not even imply an "infamous" crime. Although an "infamous" crime always implied and received an "infamous" punishment, that fact had nothing to do with the *effect* of the conviction of the "infamous" crime, *i. e.*, disqualification. Throughout the brief below there was the consistent disregard of this distinction, and the consistent coupling of the crime and the sentence—two things that need not be united to disqualify.

POINT V.

Our contention has already been upheld in another case, and has since been followed.

The United States Circuit Court in Maxey vs. U. S., 207 Fed. Rep., 327, held that one convicted of a felony was not competent to testify in a criminal proceeding in the Federal Court. There the Court had to look to the sentence to determine whether the crime was a felony, but when the Court decided that the witness was a convicted felon, it excluded him. We respectfully refer the Court to the opinion in that case, which is too long to quote, from which it appears that although it is now the trend of opinion that witnesses should be held competent wherever possible, the rule is rigid in the Federal Courts, because Congress has failed to make any provision to change the common law, which is still in full force.

This ruling was followed in U. S. vs. Gwynne, 209 Fed., 993.

An instance of how strictly was applied the rule that one convicted of an infamous crime was incompetent to testify, is found in U. S. vs. Hollis, 42 Fed., 248 (1890), where the defendant was not allowed to testify *in his own behalf*, because there was produced the record of his conviction for an infamous crime.

If it were the law that there has grown up in the Federal Courts a different theory as to the test of disqualification, namely, that only sentence to a state prison or penitentiary proves that the crime is "infamous" (even though the convict is

not sentenced to the hard labor which the common law deemed "infamous"), Broder was disqualified.

The Penal Law, which was in force in New York when Broder was convicted, provided (Sec. 2) that a crime punishable in a state prison is a felony and Sec. 888 prescribes that a second degree forgery shall be punishable by ten years imprisonment, and Sec. 23 provides that any punishment for more than a year must be in a state prison, *at hard labor*. If the felon is between 16 and 30 years of age, and is liable to sentence, under those sections, to state prison at hard labor, he may, *in the discretion of the Court*, be sent to a prison (Elmira) where his reform can be effected. That, however, is a "state prison" (ch. 711, L. 1887, Sec. 1), so it is clear that Broder, though sent to Elmira, was convicted of a felony punishable by a sentence that was infamous at common law, and in spite of the leniency due to his youth, was sent to a "state prison."

We think that in this case there is good ground for applying the settled law in our favor, by excluding Broder because of his infamous crime, in that his conviction of a crime showing moral turpitude and his confession of "guilty" on the United States indictment, show him to be unworthy of credit as a witness, and this Court should, in justice to the appellants, give them the protection that the common law gave them, and save them from the accusations of this type of man.

POINT VI.

It is respectfully submitted that the Courts below erred and that the judgment of conviction should be reversed.

Respectfully submitted,

MEIER STEINBRINK,
Counsel for Plaintiffs-in-Error.

INDEX.

Page.

Statement 1–3
Questions involved 3
Argument 4–35
Conclusion 35

I.

A. There are three rules, and apparently only three, which can be applied to these cases .. 4–34
(1) The rule laid down in United States v. Reid, 12 How. 361, and Logan v. United States, 144 U. S. 263 .. 4–15
(2) The rule laid down as a corollary to the above in Brown v. United States, 233 Fed. 353 16
(3) The rule of "general authority and sound reason" laid down in Benson v. United States, 146 U. S. 325 .. 16–34
A1. The rule laid down in the Reid and Logan cases, supra 4–15
(a) Statement of rule in the Reid and Logan cases, with the explanation thereof given in Benson v. United States 4–5
(b) The burden is on defendants to show what was the law on the subject in New York in 1789, and this burden they have not sustained because:
(x) It is impossible to discover what that law was 5–9
(y) Assuming that it was the common law, it is impossible to tell what that was in New York in 1789 9–14
(c) Assuming that the rule in New York in 1789 rendered incompetent persons convicted of treason, felony, and crimen falsi, that rule must be confined to offenses falling within said classes in 1789, which forgery in the second degree as defined by the New York statutes did not 14–15
(d) Therefore, if the rule in the Reid and Logan cases be adopted, the judgments below must be affirmed because either the law of New York on the subject in 1789 has not been proven, or because the offense in question was not within the common law rule .. 15

26180—17——1

Page.

A2. The case of United States v. Brown, 233 U. S. 353, stated. If the decision in this case be correct, the judgment of the court below in the present cases must be affirmed 16

A3. The rule laid down in the Reid and Logan cases should be abandoned, and the rule laid down in Benson's case should be extended to the subject of the competency of witnesses convicted of crime 16–34

(a) The difficulty in applying the rule laid down in the Reid and Logan cases to persons convicted of Federal offenses, or of offenses against the laws of a State other than that in which the Federal court is sitting, suggests its unsoundness 16–20

(b) Its application, as generally administered, to offenses which are merely malum prohibitum suggests the same conclusion 21–22

(c) The rule in the Reid and Logan cases has, in effect, never been followed as to any other mode of procedure in criminal cases in the Federal courts after the jury is sworn 22–30

(d) The rule laid down in the Reid and Logan cases is contrary to reason, justice, and public policy 30–31

(e) The matter should, therefore, be reexamined, in the light of reason and public policy, and the rule in Benson's case should be adopted, namely, that all witnesses are competent unless some clear reason of public policy forbids 31–33

(f) If the rule in Benson's case be adopted, the judgment of the court below must be affirmed, for there is no reason, or public policy, which required the exclusion of the witness in question 33–34

II.

The receiving letter boxes in issue were "authorized depositories for mail matter," within the meaning of section 194 of the Criminal Code. 34–35

III.

Conclusion 35

CASES.

	Page.
Bannon and Mulkey v. U. S., 156 U. S. 464	12, 22
Benson v. United States, 146 U. S. 325	4, 5, 6, 23–27, 32
Brown v. United States, 233 Fed. 353	2, 4, 16, 19
Brown v. United States, 150 U. S. 93	27
Caminetti v. United States, 242 U. S. 470	28
Considine v. United States, 112 Fed. 342	12
Dolan v. United States, 133 Fed. 440	12
Donnelly v. United States, 228 U. S. 243	28
Heike v. United States, 227 U. S. 131	28
Hickory v. United States, 151 U. S. 303	28
Hilts v. Colvin, 14 Johns. 181	7
Holt v. United States, 218 U. S. 245	29
Hyde v. United States, 225 U. S. 347	29
Jackson, Ex parte, 96 U. S. 727	34
Keliher v. United States, 193 Fed. 8	12
King v. Teal, 11 East 307	11
Lang v. United States, 133 Fed. 201	29
Logan v. United States, 144 U. S. 263	4, 17, 20
Maxey v. United States, 207 Fed. 327	6, 12, 17, 21
Pendock v. Mackender, 2 Wils. 18	10–11
People v. Herrick, 13 Johns. 83	7
People v. McGloin, 91 N. Y. 241	7
People v. Whipple, 9 Cow. 707	7
Powers v. United States, 223 U. S. 303	29
Rakes v. United States, 212 U. S. 55	20
Reagan v. United States, 157 U. S. 301	12
Stokes v. United States, 157 U. S. 187	28
Swift v. Tyson, 16 Pet. 1	33
Trust Co. v. Louisville (decided November 5, 1917)	35
United States v. Coppersmith, 4 Fed. 198	12
United States v. Grimaud, 220 U. S. 506	34
United States v. Hall, 53 Fed. 352	11
United States v. Reid, 12 How. 361	4, 23, 31
United States v. Sims, 161 Fed. 1008	29
Wilson, Ex parte, 114 U. S. 417	11, 22
Wilson v. United States, 162 U. S. 613	29

STATUTES.

Criminal Code, sec. 194	3, 34
Judiciary Act of 1789, sec. 34	20, 24
N. Y. Penal Code (title "Forgery," secs. 881, 887, 889, 890)	14–15
Penal Code, secs. 24, 67, 119, 122, 215, 335	12, 17, 21–22
Rev. Stat., sec. 858	20
Texas Stat. (1858) c. 151	20

TEXTBOOKS.

	Page.
Gilbert (Law of Ev., 6th ed., p. 126)	9
Gray (The Nature and Sources of Law, secs. 219 to 223)	8
Greenleaf (1832), sec. 373	10, 14
Hale (vol. II, p. 277)	9
Hawkins (Pleas of the Crown, vol. 2, p. 609, secs. 19 and 21)	9–10
Holmes' Common Law, p. 35	35
Maitland (Collected Papers, vol. I, p. 316)	13
Wigmore, sec. 519	9, 30

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THEODORE S. ROSEN and ABRAHAM WAGNER, Petitioners, v. THE UNITED STATES. } No. 365.

VICTOR PAKAS, Petitioner, v. THE UNITED STATES. } No. 438.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Petitioners were convicted of the charge, speaking generally and not technically, of being implicated in receiving and buying checks which they knew had been stolen from an authorized mail depository. At the trial of each there was received in evidence the testimony of a person shown to

have been theretofore convicted in the State court of the State statutory felony of forgery in the second degree. Petitioners objected to this testimony on the ground that the witness was incompetent under the rule of the common law in force in the State courts of New York at the time of the enactment of the judiciary act of 1789. In the Rosen and Wagner case the trial court held the witness competent upon two grounds: (1) "That the defendant (witness) is a codefendant, and therefore may make a statement as to the matters with which he is concerned"; and (2) that the State sentence to Elmira reformatory did not disqualify the witness. (R. 5.) The Pakas case was tried before a different judge who merely adopted the previous ruling. (R. 9.) In the Rosen and Wagner case the Circuit Court of Appeals, on writ of error, held, in effect, that the sentence, and not the character of the crime, determined competency. (R. 14.) In the Pakas case the same court, speaking through a different judge, followed the ruling of the Circuit Court of Appeals for the Sixth Circuit in *Brown* v. *United States,* 233 Fed., 353, to the effect that conviction in a State court did not disqualify in a Federal court, the two courts belonging to different sovereignties. In each of the Appellate Court's decision in the cases at bar the following additional observation was made:

> The tendency of modern thought is toward the abolition of the archaic rules

> which undertook to declare, arbitrarily, who were and who were not entitled to credence as witnesses and who should be absolutely debarred from taking the stand. All this is changed and now in most enlightened and progressive jurisdictions the tendency is to receive all the testimony bearing upon the issue, irrespective of the character of the witness who gives it. Proof of the commission of a crime discredits a witness but it does not absolutely exclude him from the witness stand.

The cases are now before this court on writs of certiorari granted at the last term.

QUESTIONS INVOLVED.

The following questions are specifically presented for solution:

1. Is a person previously convicted in a State court of the statutory felony of forgery in the second degree thereby rendered infamous and incompetent to testify on a criminal trial conducted in the Federal court sitting in one of the districts of that State?

2. Is a box erected by a patron for the reception of his mail from the letter carrier an "authorized depository for mail matter" within the meaning of section 194 of the Criminal Code? This second question was only raised in the Pakas case, but if incorrectly decided below, this court would doubtless notice it as a plain unassigned error in the Rosen and Wagner case.

ARGUMENT.

I.

A. There are three rules, and apparently only three, which can be applied to these cases:

(1) The rule laid down in United States v. Reid, 12 How. 361, and Logan v. United States, 144 U. S. 263;

(2) The rule laid down as a corollary to the above in Brown v. United States, 233 Fed. 353;

(3) The rule of "general authority and sound reason" laid down in Benson v. United States, 146 U. S. 325.

A(1). The rule laid down in the Reid and Logan cases, supra.

(a) Statement of rule in the Reid and Logan cases, with the explanation thereof given in Benson v. United States.

In the Reid case the precise question was whether the testimony of a person jointly indicted with another, though separately tried, was competent on behalf of his joint defendant. It was held that the matter was governed by the law of the State in 1789 and not by a State statute passed in 1849. No attempt, however, was made to determine what the law of the State was in 1789, and it seems to have been assumed that the witness was incompetent. It is highly important to observe that the decision did not deal solely with the question of the competency of witnesses in criminal cases in the Federal courts, but *with the entire mode of conducting a criminal trial after the jury is sworn.* It was held that *this entire subject matter* was governed by the law of the State as it was in 1789.

The Logan case simply applied this ruling to the specific question of the competency of a witness convicted of crime, evidently treating it as included within the general ruling made in the Reid case, as, indeed, it was. But in *Benson's case,* 146 U. S. 325, this court, without noticing Logan's case, in effect overruled the Reid case in so far as it held generally that the entire mode of conducting a criminal trial was governed by the law of the State as it was in 1789, even admitting that no attempt had been made in the Reid case to find out what that law was. The combined effect of the Reid, Logan, and Benson decisions is to leave the subject of the competency of witnesses convicted of crime standing apart, governed by a different rule from that applicable to every other feature of a criminal trial.

The Logan case, in addition, extended the rule in the Reid case by holding that as to States admitted to the Union since 1789 the governing principle was the law of such State when it was admitted to the Union.

(b) The burden is on defendants to show what was the law on the subject in New York in 1789, and this burden they have not sustained because:

(x) It is impossible to discover what that law was.

In the great majority of cases it is impossible to determine what was the law upon this subject in any particular State in 1789 or when it was admitted to the Union. Isolated cases may be found

where some decision or statute had, prior to that time, definitely fixed the law (as appears to have been the case in Texas according to Logan's case), but such instances are rare. What, for example, was the law upon the subject in Louisiana, California, New Mexico, and Arizona, on their admission to the Union? The practice seems to be to assume, in the absence of any decision or statute prior to the time fixed, that the common law prevailed. But what right is there to make such an assumption, and what common law is had in mind? In *Benson's case,* 146 U. S. 325, it is said that the "common law" referred to in the Reid case was the "common law as it stood in Virginia" in 1789, and not "the rule in the mother country or in the other States of the Union." So in *Maxey's case,* 207 Fed. 327, it is apparently assumed that the law in question is "the common law of Arkansas," or perhaps that there was some "common law" upon the subject prevailing generally in this country. To speak, however, of the "common law of a State" or the "common law of the United States" only increases the difficulty of determining what that law was, or whether indeed there was any such "common law" upon the subject.

Take the present cases as an example. It will be noted at the outset that the burden to show the incompetency of the witness was upon the defendants since they were asserting an exception

to the general rule, and that this burden involved showing what law governed the matter in New York in 1789. How, then, did the defendants endeavor to sustain this burden? A statute of 1829 is cited providing that conviction of a felony shall disqualify, but not conviction for any other offense. Three cases are cited, namely, *People* v. *Herrick,* 13 Johns. 83, *Hilts* v. *Colvin,* 14 Johns. 181, and *People* v. *McGloin,* 91 N. Y. 241, but none of them seems to have any bearing on the matter. In *People* v. *Whipple,* 9 Cow. 707, the judge of the Court of Oyer and Terminer held in 1827 that it was the sentence and not the punishment which disqualified by the common law. It is submitted that this statute and these decisions are insufficient to determine what was the law of New York prior to their passage or rendition. They may be evidence as to what a particular judge or legislature thought that law was, but in the absence of prior authoritative decisions or statutes it can not be told what the law was at a prior time or whether there was any law at all upon the subject. An English lawyer, being brusquely interrupted in the midst of his argument by the court with the remark, "That is not the law," replied, "It was until your honor spoke." The decision in *People* v. *Whipple* in 1827 and the statute of 1829 made the law at those dates, but they do not show what the law was before. Who could say what the law of New York was prior to 1827 as to whether it

was the sentence or the punishment which worked disqualification, or as to whether the record of conviction must be produced or not?

The theory that the law preexists its pronouncement by competent authority, or its observance by well-established, universal custom, is lucidly discussed by Prof. Gray (The Nature and Sources of Law, secs. 219 to 223), and the conclusion reached that where there is, at a certain time, no statute, precedent, or custom upon a certain legal proposition, there is in fact no law at all relative thereto. As an illustration of his view, Prof. Gray makes the following statement:

> "The difficulty of believing in preexisting law is still greater when there is a change in the decision of the courts. In Massachusetts it was held in 1849, by the Supreme Judicial Court, that if a man hired a horse in Boston on a Sunday to drive to Nahant, and drove instead to Nantasket, the keeper of the livery stable had no right to sue him in trover for the conversion of the horse. But in 1871 this decision was overruled, and the right was given to the stable keeper. Now, did stable keepers have such rights, say, in 1845? If they did, then the court in 1849 did not discover the law. If they did not, then the court in 1871 did not discover the law." The Nature and Sources of the Law (Gray), section 223.

It is submitted that, in the absence of proof by defendants of authoritative decision, statute, or perhaps custom, in New York in 1789, it must be assumed that there was no uniform rule in that State at that time on the subject of the competency of witnesses convicted of crime.

(y) Assuming that it was the common law, it is impossible to tell what that was in New York in 1789.

Assuming, however, that the common law governs the subject, is it possible to say what was the common law on the subject as it stood in New York in 1789? Wigmore states (sec. 519) that some doctrine as to the disqualification of witnesses convicted of crime was firmly enough established in England by the end of the sixteen hundreds. It was, however, certainly a vague one and based upon no ascertainable principle. Hawkins (Pleas of the Crown, vol. 2, p. 609, sec. 19), apparently following Lord Coke, merely gives a list of the offenses, namely, treason, felony, piracy, praemunire, perjury, forgery on the fifth Elizabeth, false verdict, conspiracy on suit of the King, a judgment in the pillory, or to be whipped and branded. Hale (Vol. II, p. 277), also merely gives a list, including forgery under fifth Elizabeth, but not under 1 H. 5th, Cap. 3. Gilbert, in his Law of Evidence, sixth edition, page 126, states the crimes which "blemish" a person as "treason, felony, and every crimen falsi, as perjury, forgery, and the like." Blackstone does not

seem to mention the matter. Greenleaf, writing in 1832 (sec. 373) admits that it was even at that time difficult to determine what crimes "render the perpetrator infamous," and gives treason, felony, and crimen falsi. It is evident that the offenses mentioned by these writers are not bound together by any common principle or based upon any sound reason. Some patriots have been convicted of treason without anything in their conduct calculated to destroy credibility. Felonies differ widely from each other, and while some may, others, as manslaughter, certainly do not affect credibility. It is clear that, in spite of the final rule that it is the character of the offense and not the punishment which governs, treason and felony were included because of the nature of the punishment, namely, death or forfeiture. (Hawkins, p. 610, sec. 21, states that a person admitted to his clergy and burnt on the hand was reenabled as a witness, which, if true, must have limited greatly the application of the rule to felonies.) No reason whatsoever is given for including forgery, and the adoption of the Latin term "crimen falsi" is inconclusive, not to say illusory. No one apparently knew at that time what offenses the term covered. So with other parts of the doctrine. The rule that it is the offense and not the punishment which governs does not appear to have been settled till 1755 (*Pendock*

v. *Mackender,* 2 Wils. 18), and is then supported by the following reasoning:

> And he that steals a penny has as wicked a mind as he that steals a large sum, if not a more wicked mind, for he has the less temptation.

As late as 1809 (*King* v. *Teal,* 11 East 307, 309) it was arguable that a confession of perjury made the witness incompetent as much as a conviction. The same vagueness appears as to other points, e. g., whether the conviction was final, or whether the witness could prove his actual innocence; whether the judgment of conviction must be produced; whether a pardon, or serving out the sentence reenabled the witness (see the Pennsylvania statute referred to in *United States* v. *Hall,* 53 Fed. 352). In this state of uncertainty and confusion on the subject in 1789, who can say what the common law "*as it stood in New York*" was in 1789? Evidently the test of forfeiture of goods and capital punishment could not have been decisive because there was no forfeiture of goods, and most felonies were not capital offences. This difficulty was only got over by *subsequent* legislation and rulings in New York and other jurisdictions. In spite of the rule that it is the character of the crime and not the punishment which governs, and in spite of the clear distinction drawn by this court in *Ex parte Wilson,* 114 U. S. 417, 422, 423, between infamous crimes which must be

presented by indictment, and crimes which affect competency, the nature of the punishment is constantly made the test by legislatures and courts. The State of New York has a statute defining felonies by the punishment which may be inflicted, and in *Maxey* v. *United States,* 207 Fed. 327, sec. 335 of the Penal Code of the United States fixing felonies by the possibility of punishment exceeding one year is relied on. However, in *United States* v. *Coppersmith,* 4 Fed. 198, it was held that uttering counterfeit coin was not a felony; in *Considine* v. *United States,* 112 Fed. 342 (opinion by Judge Day, concurred in by Judges Lurton and Severens) that forcibly breaking into a post office with intent to commit larceny was not a felony; in *Dolan* v. *United States,* 133 Fed. 440, 452, 453 (C. C. A. 8th Circuit), that " felony " had a popular as well as a technical meaning; and in *Keliher* v. *United States,* 193 Fed. 8, 23, 24, that an officer of a bank convicted of embezzling its funds was not incompetent. In *Bannon* v. *United States,* 156 U. S. 464, 467, 468, it is expressly held that because the punishment affixed to an offense is infamous, the offense itself is not thereby necessarily raised to the grade of felony, and that in the absence of a statute the word " felony " is used to designate such serious offenses as were formerly punishable by death or forfeiture. This is followed in *Reagan* v. *United States,* 157 U. S. 301, 302, 303, where it is said that the meaning of the

term has departed largely from the technical meaning it had "at the old common law," and John Stuart Mill is quoted with approval as follows:

> There is not a lawyer who would undertake to tell what a felony is, otherwise than by enumerating the various kinds of offenses which are so called.

The great authority of Maitland is also to the same effect (Collected Papers, Vol. I, p. 316):

> * * * I believe that nowhere save in England did felony ever come to stand for a vast class of crimes, or to include such a matter as theft; and it may be observed that in England it soon lost all descriptive power. It came to stand for a number of crimes which could be enumerated, but no definition of felony ever was or could be formed. * * *

What, then, was the law of New York in 1789 as to what was a felony and as to what felonies made a witness incompetent? So as to forgery which, according to the old writers, was in a class by itself of a peculiar character, but which seems to be considered by modern authorities as a branch of the *crimen falsi*. Why is forgery any different from, or any more a branch of the *crimen falsi* than, e. g., uttering counterfeit coin or embezzlement? What was the law of New York in 1789 as to the status of forgery? And generally, what

was that law as to the content of the term "crimen falsi"? It is submitted that no safe answer can be given to these questions.

(c) Assuming that the rule in New York in 1789 rendered incompetent persons convicted of treason, felony, and crimen falsi, that rule must be confined to offenses falling within said classes in 1789, which forgery in the second degree as defined by the New York statutes did not.

If it be assumed, in spite of the above, that the law of New York in 1789 was as stated by Greenleaf in 1832, then we claim that only those offenses which in 1789 fell within the classes (i. e., treason, felony, or crimen falsi) named can be considered, and that, as forgery in the second degree (the offense of which the witness in the case at bar was convicted) was not known at that time, the rule of disqualification laid down in the Reid case can not apply. It may be said that this objection is merely technical; but the rule invoked is merely technical, and the Government has a right to insist that, if it be adopted, it shall be kept within its narrowest limits. Moreover, an examination of the title "Forgery" in the New York Penal Code discloses many offenses given that name which were not *in their nature* apparently forgery at common law. Thus by section 881 uttering a forged instrument is forgery. So by section 887 (3) it is forgery in the second degree to have in one's possession a plate in the similitude of a bank check with intent to use it;

and by section 889 (1) it is forgery in the third degree for an officer of a corporation falsely to alter entries on its books no matter what his intent or the effect thereof; and by the same section (par. 2) it is the same offense falsely to make, etc., a letter, etc., by which a person shall be injured in his good name. Section 890 makes it forgery in the third degree for an officer of a corporation to sell, etc., forged or *fraudulent* certificates of stock or bonds. Plainly such offenses are purely statutory and could not in 1789 have fallen within any of the categories of crimes generally given, nor indeed would they fall within the common-law rule, taken in any sense, unless the fact that they are made felonies by the statute law of New York on account of the penalty attached is to have that effect. To permit this would be to go contrary to the principle at the bottom of the Reid case, namely, that the States can not be permitted to control the criminal jurisprudence of the Federal courts. To deny to the States the right to declare the rule from time to time would be ineffectual if they were permitted to declare from time to time what offenses fall within the rule.

(d) **Therefore, if the rule in the Reid and Logan cases be adopted, the judgments below must be affirmed because, either the law of New York on the subject in 1789 has not been proven, or because the offense in question was not within the common law rule in 1789.**

This follows necessarily, if the reasoning above be correct.

A(2). The case of United States v. Brown, 233 Fed. 353, stated. If the decision in this case be correct, the judgment of the court below in the present case must be affirmed.

In the case of *United States* v. *Brown*, 233 Fed. 353, the Court of Appeals for the Sixth Circuit held, on full consideration and in an elaborate opinion, that a person convicted in a State court of an offense which constituted a felony according to the laws of the State was not incompetent as a witness in a Federal court, for the reason that to so hold would be to enforce the penal laws of another jurisdiction, contrary to the general principles of the common law. If that decision be correct, the judgments of the court below in the present cases must be affirmed, since the witness in question was convicted in the State court of New York of an offense which was a felony according to the laws of that State, and therefore the decision in the Brown case is directly applicable and decisive.

A(3). The rule laid down in the Reid and Logan cases should be abandoned, and the rule laid down in Benson's case should be extended to the subject of the competency of witnesses convicted of crime.

(a) The difficulty in applying the rule laid down in the Reid and Logan cases to persons convicted of Federal offenses, or of offenses against the laws of a State other than that in which the Federal court is sitting, suggests its unsoundness.

The practical working of the rule laid down in the Reid and Logan cases, as exemplified by the

decisions of the lower Federal courts, shows that it is so difficult of application as to suggest its unsoundness. Take the Maxey case, *supra,* as an example. It was there held that a person convicted in a *Federal court* of using the mails with intent to defraud, in violation of section 215, Penal Code, was incompetent as a witness in another *Federal* court sitting in Arkansas, because the common law rule as to competency of witnesses obtained in that State. This view, however, can not be maintained under the rule laid down in the Logan case. There it is clearly held, and specifically with reference to the witness Martin (144 U. S. 303), that the test is whether the witness is competent by the law of the State where the Federal court is sitting; that is, whether under that law the witness was competent to testify in the State courts. It was further held that under the common law a person convicted in one sovereign jurisdiction was not thereby rendered incompetent in another sovereign jurisdiction. According to the decision in the Maxey case the common law was the law of Arkansas. Therefore a person convicted in a Federal court of a violation of a law of the United States would not be incompetent in Arkansas—the State and Federal sovereignties being foreign to each other for this purpose—and hence he would not be incompetent in a Federal court sitting in Arkansas. This result would follow under the Logan de-

cision in almost every case of a witness convicted in a Federal court, except where the conviction was for an offense on the high seas or at a place within the exclusive jurisdiction of the United States, for in the absence of a statute or authoritative decision prior to 1789, or at the time the State was admitted to the Union, the common law is assumed to exist according to the prevailing notion, and where there was a statute prior to said times, it almost always, so far as we can find, confined its effect to crimes committed against the laws of the State. Thus the anomalous result is reached that under the Logan case a witness convicted of a violation of Federal law would generally be competent in a Federal court. Furthermore, under the same case, a witness convicted of a violation of the law of a State other than that in which the Federal court is sitting would also generally be competent.

To put the matter in another way: The law of the State to which reference is made in the Reid and Logan cases is not merely a general statement of abstract law, but the actual rule governing *the courts of the State.* It states what witnesses will be incompetent *in those courts,* for, of course, it could not govern any other courts. If the common law be the law of the State, the State rule will be that a person convicted of an offense against the laws of another State or sovereignty is nevertheless competent to testify in the courts

of that State. The Federal courts, under the rule laid down in the Reid and Logan cases, must take this law of the State in its entirety as a concrete rule administered in the courts of the State (since they have according to those decisions no other rule to go by), and must therefore hold competent all those persons who would be held competent under the State law if the question were presented in the State courts.

This leaves for examination the question of the incompetency of a witness convicted of a damnifying offense under a law of the very State in which the Federal court happens to be sitting.

In the case of *Brown* v. *United States*, 233 Fed. 353,—relied upon by the court below in the Pakas case—it was held, as stated above, that a person convicted of an offense against the law of the very State in which the Federal court was sitting was not thereby rendered incompetent in the latter court, because to so hold would be to enforce the penal laws of another sovereignty. If the suggestions contained in the Brown case with respect to the meaning and effect of the Logan case should be accepted and the two in that way harmonized, there would be proportionately very few cases left for the rule of the Reid and Logan cases to operate upon. In our opinion, however, the decision in the Brown case is manifestly unsound. In applying the rule of the Reid and Logan cases, the Federal courts are not *enforcing*

the laws of the State. They are simply adopting them as a standard in regard to rules of evidence in criminal cases, just as Congress did as to "trials at common law" in section 34 of the Judiciary Act of 1789, and in section 858, Revised Statutes. So the Texas statute of 1858, chapter 151, referred to in the *Logan case* (144 U. S. 299), making persons convicted of felony in Texas *or elsewhere* incompetent, did not thereby enforce the penal laws of another sovereignty, but simply fixed a rule of evidence for the Texas courts.

It has been held that it is entirely competent for Congress to measure the punishment which it imposes by that which is prescribed by the local law for like acts; and when this is done—"*though measured by those laws, the penalty is imposed by the law of the United States.*" *Rakes* v. *United States,* 212 U. S., top page 58.

If this reasoning be correct, it follows as the logical conclusion from the Reid and Logan cases, that persons convicted of a felony, etc., in a Federal court would in the majority of cases be competent in a Federal court; that the like result would follow as to persons convicted of felonies in the courts of a State other than that in which the Federal court happens to be sitting; but that persons convicted of felonies in the very State where the Federal court happens to be sitting would generally be incompetent, a most undesirable result. A rule which leads to such conclusions can hardly be sound.

(b) Its application, as generally administered, to offenses which are merely mala prohibita suggests the same conclusion.

In the practical application of the rule laid down in the Reid and Logan cases, the courts always construe that to be a felony, and consequently to render the witness incompetent, which is made a felony by the law of the State when the conviction is for a State offense, or by the law of the United States when the offense is a violation of Federal law. The result is that many statutory offenses which are in their nature merely *mala prohibita,* and not in the least *mala in se,* are held to render the witness incompetent because of the punishment inflicted by the statute law of the State or of the United States.

For example, the rule adopted in the *Maxey case,* 207 Fed., 327, relying on section 335, Penal Code, defining a felony, that the punishment permitted by the criminal laws of the United States, and not the character of the crime, disqualifies, is cogently shown to be unsafe and wholly indefensible upon principle, by a mere glance at the offenses for which a sentence exceeding one year may be imposed, but which offenses obviously could not affect the credibility of the " delinquent " to the extent of ruling out his testimony altogether. Consider a few examples. Section 24 of the Penal Code permits imprisonment of five years in the case of an Army or Navy officer who " fixes, or attempts to prescribe or fix, whether by proclama-

tion, order, or otherwise, the qualification of voters at an election in any State." Section 67 permits imprisonment of two years in the case of an importer who makes "to any officer of the revenue any gratuity or present of money or other thing of value." Sections 119 and 122 permit imprisonment for three years in the case of one who solicits or receives political contributions in a building or room set aside for the transaction of Government business. Many other instances might be mentioned, but these will suffice. Certainly none of these offenses is comparable with the offense of "obtaining goods by false pretenses, or the uttering of counterfeit coin or forged securities," held by this court in *Ex parte* Wilson, *supra*, not to disqualify. It would shock even the most technical mind to suggest that any of the Federal offenses above enumerated could in any wise destroy the credibility of the party, and yet if the ruling of this court as interpreted by the Maxey decision, *supra*, were adhered to, such merely *malum prohibitum* offenses would work disqualification and thereby aid not in the development but the suppression of the truth. *Bannon and Mulkey* v. *United States*, 156 U. S., 464, 466, 467.

(c) The rule in the Reid and Logan cases has, in effect, never been followed as to any other mode of procedure in criminal cases in the Federal courts after the jury is sworn.

The Reid case, as stated above, purported to lay down a general rule as to the conduct of criminal

trials in the Federal courts after the jury has been sworn. It has never been followed by this court on any point of such mode of conduct except the competency of witnesses convicted of crime.

A striking departure from the rule is found in *Benson* v. *United States,* 146 U. S. 325. The question at issue was the right of the Government to call as a witness a party jointly indicted with the defendant but granted a severance. Counsel urged that the witness was incompetent under the Reid case, *supra,* because of their view that a codefendant incompetent when called as a witness by the other defendant must likewise be incompetent when called as a witness by the Government. Certainly the temptation of the witness to swear himself "out of the charge" and "the fear of perjury" are not more potently present in the one case than the other. The manner in which this court distinguished the Reid case, however, and held the witness competent is disclosed by the following excerpt from its opinion (pp. 334, 335, 336):

> But it is said that this court has already practically decided this question in the case of *United States* v. *Reid,* 12 How. 361. The precise question in that case was as to the right of the defendant to call his codefendant, and not that of the Government to call the codefendant, and a distinction has been recognized between the two cases. It

is true that the reasons given for the exclusion of the witness in one are largely the same as those given for his exclusion in the other, to wit, interest and being party to the record; but public policy is also urged in favor of the exclusion of one defendant as a witness for his codefendant, for each would try to swear the other out of the charge. And as the distinction prevailed, whether founded on satisfactory reasons or not, it is sufficient to justify us in holding that that case is not decisive of this. Further, the stress in that case was not on this question. The defendant was indicted and tried in the Circuit Court of the United States for the District of Virginia. A statute had been passed in that State, in terms permitting a codefendant when not jointly tried to testify in favor of the one on trial, and that statute was invoked as securing the competency of the witness, and the question which was discussed was whether the existing statute law of Virginia controlled, and it was held that it did not, and that the question was to be determined by the common law as it stood in Virginia at the date of the Judiciary Act of 1789. It was assumed both in this court and in the Circuit Court, 3 Hughes 509, 539, 540, that by that law the codefendant was incompetent. It was not affirmed that such was the rule in the mother country or in the other States of the Union. We do not feel ourselves, therefore, precluded by

> that case from examining this question in the light of general authority and sound reason.
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> Nor were those named the only grounds of exclusion from the witness stand; conviction of crime, want of religious belief, and other matters were held sufficient. Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors. But the last fifty years have wrought a great change in these respects, and to-day the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction.

After referring to the Federal statutes relating to witnesses in civil cases, and permitting defendants in criminal cases to testify at their own request, the opinion proceeds as follows (p. 337):

> * * * His competency being thus established, the limits of examination are those which apply to all other witnesses. Legislation of similar import prevails in most of the States. The spirit of this legislation has controlled the decisions of the courts, and

steadily, one by one, the merely technical barriers which excluded witnesses from the stand have been removed, till now it is generally, though perhaps not universally, true that no one is excluded therefrom unless the lips of the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, like that of husband and wife, forbids the breaking of silence.

In the light of these authorities and this legislation of Congress, there is less difficulty in disposing of this question. If interest and being party to the record do not exclude a defendant on trial from the witness stand, upon what reasoning can a codefendant, not on trial, be adjudged incompetent? The conviction or acquittal of the former does not determine the guilt or innocence of the latter, and the judgment for or against the former will be no evidence on the subsequent trial of the latter. Indeed, so far as actual legal interest is concerned, it is a matter of no moment to the latter. While the codefendant not on trial is a party to the record, yet he is only technically so. Confessedly, if separately indicted, he would be a competent witness for the Government; but a separate trial under a joint indictment makes, in fact, as independent a proceeding as a trial on a separate indictment. In view of this, very pertinent is the observation of Chief Justice Beasley, in *State* v. *Brien, supra:* "The

only reason for the rejection of such a witness is, that his own accusation of crime is written on the same piece of paper, instead of on a different piece, with the charge against the culprit whose trial is in progress. It is obvious such a rule could only stand, in any system of rational law, on the basis of uniform precedent and ancient usage. I have discovered no such basis." We think the testimony of Mrs. Rautzahn was competent and there was no error in its admission.

It seems plain that, strictly considered, the above case was ruled by the Reid case, and that a different conclusion was reached only through observing the *spirit* of subsequent Federal legislation and the change which "fifty years" had wrought in enlarging the "domain of competency" of witnesses. Stated differently, the courts have awakened to the absurdity of debarring a witness from the stand on grounds which have no present-day potentiality. The opinion is certainly in accord with modern and enlightened criminal jurisprudence and supports on principle the competency of the witness in the cases at bar.

In *Brown* v. *United States,* 150 U. S. 93, this court, without attempting to show what rule was in force in the courts of Arkansas at the time of is admission into the Union, merely followed the weight of authority generally, and held incompetent the testimony of an alleged coconspirator after the offense, murder, had been consummated.

In *Heike* v. *United States*, 227 U. S. 131, 144, 145, the admission of certain books and testimony showing a previous course of conduct was upheld by this court without regard to whether the rule adopted was the rule of the State courts prior to 1789.

In *Donnelly* v. *United States*, 228 U. S. 243, 273, the " practically unanimous weight of authority in the State courts " was followed in sustaining the ruling of the lower court in denying the admission in evidence of the declaration of a third party " made out of court and tending to exonerate the accused." An interesting dissent was written by one of the members of this court and concurred in by two others, but neither the majority nor the minority appears to have determined whether the rule applied was the one followed by the State courts in 1789.

In *Caminetti* v. *United States*, 242 U. S. 470, the duty resting upon a defendant who takes the stand, to testify fully, and the question whether accomplices must be corroborated, were determined upon general principles without reference to what may have been the rule in the State courts in 1789.

See also—

Hickory v. *United States*, 151 U. S. 303, 306;

Stokes v. *United States*, 157 U. S. 187, 194;

Wilson v. *United States,* 162 U. S. 613, 620, 621;

Holt v. *United States,* 218 U. S. 245, 252;

Powers v. *United States,* 223 U. S. 303, 314. 315;

Hyde v. *United States,* 225 U. S. 347, 383, 384.

Thus it appears that the general rule by which this court determines questions of evidence and procedure in criminal cases in Federal courts is not the strict one laid down in the Reid case, *supra,* but is substantially the one so tersely framed by the United States Circuit Court of Appeals for the Seventh Circuit in *Lang* v. *United States,* 133 Fed. 201, 204:

> Questions relating to the admissibility of evidence in criminal prosecutions, based on violations of the Statutes of the United States, are questions wholly within the general rules and law applicable to the conduct of trials, and not at all subject, except as State statutes or decisions may be persuasive, to the statutes or decisions prevailing in the particular State where the court happens to sit; otherwise each State would have a substantial part in determining the manner in which the courts of the United States should enforce, not the law of the State, but the national laws.

Moreover, in at least one case dealing specifically with the competency of witnesses convicted of crime (*U. S.* v. *Sims,* 161 Fed. 1008), the court

without noticing the Reid and Logan cases followed the Benson case, *supra,* and decided the case "in the light of general authority and sound reason."

(d) The rule laid down in the Reid and Logan cases is contrary to reason, justice, and public policy.

It is clear that the rule making a witness convicted of treason, felony, or *crimen falsi,* incompetent as a witness in a criminal case is a mere survival of some archaic notions, and has nothing to sustain it in modern ideas, either generally, or specially as applied to a jury. It was in all probability originally founded on the idea of additional punishment to the person convicted of a heinous offense. He was to be branded with the stigma of outlawry as to courts of justice. (Wigmore, sec. 519.) This reason for the rule, however, entirely overlooked the fact that the true punishment is inflicted, not on the witness, but on the parties to the cause. In a criminal case those parties are the State and the defendant. Where, in such a case, a witness is held incompetent, either the State is rendered impotent to enforce its criminal laws, or, what is just as important, a person accused of crime is prevented from establishing his innocence. The original ground of the rule being found indefensible, its basis was, therefore, shifted, and the argument advanced that conviction of certain offenses in itself rendered the witness so entirely, and under all circumstances, de-

void of truth as to prohibit even the submission of his testimony to a jury. Clearly, however, the second reason is as insufficient as the first, mainly, because it usurps one of the principal functions of the jury. The credibility of a witness is a question of fact to be determined by all the circumstances, and can not, in the nature of things, be determined *a priori* by rules imposed by the courts. Such rules are necessarily rigid and tend to become technical. The rights of the State upon the one hand and of the defendant on the other can not be permitted to depend upon them, with the risk of a complete failure of justice, either at the trial on account of insufficient proof, or later through reversible error in the admission of incompetent testimony. It can not be that this court, the highest in the land, and the one least tied down by technical rules, will allow this important subject to be governed by notions, the origin and justification of which no one knows, which have not a scintilla of usefulness at the present day, and which lead to results destructive of the fair administration of criminal justice.

(e) The matter should therefore, be reexamined, in the light of reason and public policy, and the rule in Benson's case should be adopted, namely, that all witnesses are competent unless some clear reason of public policy forbids.

It is submitted, therefore, that the rule announced, for the first time definitely in 1851, in *United States* v. *Reid,* should now be abandoned,

and in its stead the principle should be adopted upon which *Benson* v. *United States,* 146 U. S. 325, 335, 336, 337, appears to have been dominantly rested, viz, " general authority and sound reason," and the fact that " merely technical barriers which excluded witnesses from the stand have been removed, till now it is generally, though perhaps not universally, true that *no one is excluded therefrom* unless the lips of the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, like that of husband and wife, forbids the breaking of silence." These principles seem to have been the guiding rule adhered to by this court in determining other questions of criminal procedure and evidence in the Federal courts, as exemplified in the numerous cases hereinbefore cited, and should control here.

Nor does there appear to be any valid objection to such a course. The court in the Reid case undoubtedly made law. There was no act of Congress specifically dealing with the case, and the court had confessedly to impute an intention to Congress which that body had not expressed. If the rule so imputed to Congress be found by experience to be unworkable and not to be based on sound principle, is there anything to prevent this court from revising it and imputing to Congress an intention more conformable to reason and to the practical necessities of the case? The situation confronting the court is that Congress has

made no provision dealing generally with the procedure in criminal cases in the Federal courts after the jury is sworn. Is there any reason why this situation should not be met by a consideration of the national character of the Federal courts, and by the adoption, therefore, of the rule approved by the best authorities and reasoning? This was done in *Swift* v. *Tyson,* 16 Peters 1, and the cases following it as to general commercial law, and is also exemplified in the operation of rules of court. Is it not just as likely that Congress, in not providing specifically for the matter, intended that the courts themselves should regulate procedure in trials before them as that it intended to bind the Federal courts to a *State rule* existing *at a certain fixed time?*

(f) If the rule in Benson's case be adopted, the judgment of the court below must be affirmed, for there is no reason, or public policy, which required the exclusion of the witness in question.

If the rule approved by the best authority and reason be adopted, and it be held that every witness is competent unless some manifest public policy forbids, the judgments below in the present cases must be affirmed. To hold that a person of tender years convicted of a statutory offense and sentenced to a reformatory shall forever after be incompetent as a witness unless he be pardoned (an exception impossible to understand where the pardon is not based on innocence), shocks all sense

of justice and right. Clearly no reason or public policy requires such a result.

II.

THE RECEIVING LETTER BOXES IN ISSUE WERE "AUTHORIZED DEPOSITORIES FOR MAIL MATTER," WITHIN THE MEANING OF SECTION 194 OF THE CRIMINAL CODE.

The opinion of the Circuit Court of Appeals in the Pakas case (R. 73) so thoroughly disposes of the question that it would seem idle to seek for additional reasons sustaining the thought that a box erected for the purpose of facilitating the letter carrier in the discharge of his official functions, is an authorized depository for mail matter.

The boxes from which the letters containing the checks were stolen had been made "authorized depositories" by an executive order which did not exceed the scope delegated to it by congressional enactment. The order was introduced in evidence. (See Pakas record, top of page 21, *United States* v. *Grimaud,* 220 U. S. 506; *Ex parte Jackson,* 96 U. S. 727.) The box in question is not materially different from a lock box located in a post office, which a patron rents, and into which the postal authorities deposit his mail. Would it be contended that one could rifle such a box without Federal liability? The answer is obvious. Both boxes are equally postal facilities, and the fact

that in the one case the box is owned absolutely by the patron, while in the other the ownership is only such as inheres in a lease or rental, can make no legal difference in the cases at bar.

III.

CONCLUSION.

It is respectfully submitted that the judgments of conviction should be affirmed.

It should no longer be that "precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten." (Holmes Common Law, p. 35.)

Paraphrasing the concluding sentence of the very recent opinion (November 5, 1917) in *Trust Company* v. *Louisville*—We presume that like other appellate courts the Supreme Court of the United States is free to depart from precedents, if on further reflection it thinks them wrong.

WILLIAM C. FITTS,
Assistant Attorney General.

DECEMBER, 1917.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THEODORE S. ROSEN AND ABRAHAM WAGNER, petitioners,
v.
THE UNITED STATES OF AMERICA. } No. 868.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION.

Clearly none of the three points set forth as headings in the brief attached to the petition is of sufficient public importance to justify the issuance of a writ of certiorari, however important they may be to the petitioner. *Fields* v. *United States*, 205 U. S. 292, 296. There is an intimation that the decision of the Court of Appeals in this case is contrary to the decision of the Court of Appeals for the Eighth Circuit in *Maxey's* case, 207 Fed. 327. An examination of the two opinions, however, does not bear this out. In the present case the court followed the general principle laid down in *Logan's* case, 144 U. S. 263, namely, that the competency of witnesses in

criminal cases in the Federal courts is governed by the law of the State where the court sits, as it was either in 1789—when the Federal courts were established—in the case of the original States, or as it was when the State was admitted to the Union. New York falls within the first class, and it was assumed—no doubt correctly—that the law of New York on the subject in 1789 was the common law. The question, therefore, was whether under the common law the witness was incompetent. He had pleaded guilty in a State court to forgery in the second degree, and had been sentenced to the Elmira Reformatory, but no term of sentence was fixed. No such offense as forgery in the second degree and no such sentence were known to the common law. Both arise from New York statutes. It is therefore necessarily difficult to determine whether this offense was a felony at common law, just as it is difficult to say whether the criterion of felony at common law was not the punishment inflicted, *e. g.*, forfeiture of property or capital punishment. (See Blackstone, Cool y's ed., vol. 4, p. 95, and Judge Cooley's note; 1 Hawk. ch. 25; Russell on Crimes, 7th ed., p. 8.) Or it may be that this court in *Reid's* case, 12 How. 361, while it denied the power of the States to regulate the competency of witnesses in Federal courts and therefore crystallized the Federal law by the State law at a past period, yet was willing to allow the States to define, from time to time, felony for Federal purposes, thus indirectly regulating the competency of witnesses in Federal courts. If that be so, the ques-

tion in the present case would be whether the offense and punishment of the witness constituted a felony under the law of New York, and further, perhaps, whether this question is to be determined by the State courts or the Federal. In this predicament the court below held that the indeterminate sentence in the Elmira Reformatory took the offense out of the category of felonies—a humane decision at any rate. In *Maxey's* case the court followed the same general rule as the court in the present case, and held that the common law was the law of Arkansas on the subject when the State was admitted to the Union. As to the question of felony, however, since the witness had been convicted *in a Federal court* and sentenced to 15 months in the penitentiary, the court had the assistance of section 335, Penal Code, making all offenses punishable by imprisonment for more than a year felonies, and, moreover, the point as to whether the offense was a felony or not at common law was not disputed apparently. Of course section 335 can have no application to the present case, since here the offense of the witness was against the State and the conviction in a State court. The two cases, therefore, do not seem to have any connection with each other, and of course do not conflict.

If it were possible through the medium of this application to have this court take cognizance of the whole subject of the competency of witnesses in criminal cases in the Federal courts the Government would not be averse, owing to the great confusion and uncertainty prevailing on the subject. In that

connection the court's attention is called to *Brown* v. *United States*, 233 Fed. 353, which does not appear to have been known to court or counsel in the present case. There the Court of Appeals for the Sixth Circuit held that a conviction in a State court—even of a felony—can never make a witness incompetent in a Federal court because to effect this result would be to enforce the penal laws of a foreign sovereignty. These various decisions of the lower courts (and others could be cited) show a mental confusion and doubt as to what is the rule upon the subject which is most prejudicial to the administration of justice.

However, the present petition does not seem broad enough to raise the general question, and therefore the Government believes it should be denied.

JOHN W. DAVIS,
Solicitor General.

WM. WALLACE, JR.,
Assistant Attorney General.

JANUARY, 1917.

○

Office Supreme Court, U. S.
FILED
MAR 12 1917
JAMES D. MAHER
CLERK

No. 989

IN THE

Supreme Court of the United States

October Term, 1916.

No.

VICTOR PAKAS,

Petitioner,

versus

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TERENCE J. McMANUS,
Attorney for Petitioner.

HAROLD RIEGELMAN,
Of Counsel.

INDEX.

Notice of Application 1

Petition for Writ of Certiorari 4

Brief in support of Petition for Writ of Certiorari 14

Point I 16

Point II 48

Notice of Application. 1

Supreme Court of the United States

OCTOBER TERM, 1916.

VICTOR PAKAS,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent. 2

SIRS:

PLEASE TAKE NOTICE that upon the certified copy of the transcript of record herein, and upon the annexed petition of Victor Pakas, verified the 26th day of February, 1917, we shall move the Supreme Court of the United States, at the Capitol in the City of Washington, District of Columbia, on Monday, the 19th day of March, 1917, at the opening of Court on said day, or as soon thereafter as counsel can be heard, for a Writ 3 of Certiorari directed to the United States Circuit Court of Appeals in and for the Second District, to bring before the Supreme Court all of the proceedings of the said Circuit Court of Appeals in the case lately pending therein for revision and review, wherein the United States of America was defendant in error, and your petitioner was plaintiff in error, and to that end we now tender herewith a petition with a certified copy of a transcript of record in said Cir-

4 cuit Court of Appeals for such proceedings herein as to the Supreme Court may see proper, and for such other and further relief in the premises as may be just.

Dated, New York, February 28th, 1917.

Yours, etc.,

TERENCE J. MCMANUS,
Attorney for Petitioner,
Office and P. O. Address,
170 Broadway,
Borough of Manhattan,
5 City of New York.

To: THOMAS WATT GREGORY, Esq.,
Attorney-General,
Washington, D. C.
MELVILLE J. FRANCE, Esq.,
Attorney for United States,
United States P. O. Building,
Brooklyn, N. Y.

IN THE SUPREME COURT OF THE UNITED STATES,

6 OCTOBER TERM, 1916.

VICTOR PAKAS,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

Now comes Victor Pakas, by Terence J. McManus, his attorney, and moves this Court by a certified copy of the transcript of the record

herein and upon the annexed petition verified 7
the 26th day of February, 1917, for a Writ of Certiorari, directing the United States Circuit Court of Appeals in and for the Second District, to bring before this Court all the proceedings of said Circuit Court of Appeals, in the case lately pending therein for revision and review, wherein the United States of American was defendant-in-error and the petitioner herein was plaintiff-in-error, and to that end, they now tender herewith their petition with a certified copy of the transcript of the record in the said District Court and the said Circuit Court of Appeals, for such proceedings therein as to the Supreme Court may seem proper and for such other and further relief in the premises as may seem just. 8

9

10 **Petition for Writ of Certiorari.**

IN THE SUPREME COURT OF THE

UNITED STATES,

OCTOBER TERM, 1916.

VICTOR PAKAS,
Petitioner,
against
11
UNITED STATES OF AMERICA,
Respondent.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Victor Pakas respectfully shows:

12 1. That at a stated Term of the United States District Court, for the Eastern District of New York, begun and held on the 6th day of October, 1915, the Grand Jury impanelled in the District Court of the United States for the Eastern District of New York, returned an indictment against your petitioner and one Samuel Broder, charging that at stated times they feloniously bought and received certain checks therein described, that had previously been stolen, taken and embezzled from certain mail matter, which had theretofore been deposited in the mails of the United States for mailing, in contravention of Section 194 of the Act of March 4, 1909.

2. That thereafter the defendant Victor Pakas, your petitioner, pleaded not guilty to said indictment; that subsequently and on or about the 21st day of June, 1916, the issues were brought on for trial in the District Court of the United States, for the Eastern District of New York, and thereafter continued until the 22nd day of June, 1916; that thereafter a verdict of guilty was rendered on that day against your petitioner; that thereafter defendant was sentenced to imprisonment for the term of one year and one day on each count of the indictment, in the United States Penitentiary at Atlanta, Georgia, the period of confinement imposed in each count to be served concurrently. On the 22nd day of June, 1916, a Writ of Error for the review of the said verdict of conviction by the Circuit Court of Appeals, for the Second Circuit, was duly allowed and your petitioner was admitted to bail pending its determination On or about the 12th day of February, 1917, the Circuit Court of Appeals rendered its decision affirming the judgment of the District Court and furthered ordered that the sentence be affirmed. A certified copy of the entire record of said case in the said Circuit Court of Appeals is hereb furnished as a part hereof in conformity with Rule 37 of the Rules of Practice of this Honorable Court, and same is hereby marked Exhibit No. 1.

III. That your petitioner is advised and verily believes that the said judgment of the United States Circuit Court of Appeals is erroneous, for the reasons following:

IV. That the questions of law involved here

16 are the competency of a witness, convicted of a felony in a State Court and unpardoned, to testify in a Federal criminal proceeding, and also the jurisdiction of the Federal Government over private mailing boxes situated within office buildings and under the complete and exclusive control of the owners thereof, and used by them solely as receptacles to which the Post Office agents have no access save to part with custody of mail matter.

17 V. That as to the question of the competency of a witness convicted of a felony in a State Court, the opinion of the Circuit Court of Appeals is erroneous insofar as it holds that the testimony of such a witness is admissible in a criminal case tried in a Federal Court, and is in direct conflict with U. S. v. REED, 12 How. 361, where it was held by Mr. Chief Justice Taney, speaking for the Court, that the rule by which the Courts of the United States are to be governed in the admission of testimony in criminal cases may be found by necessary implication in the Acts of 1789 and 1790, establishing
18 the Courts of the United States, and providing for the punishment of certain offenses.

> "And the law by which, in the opinion of this Court, the admissibility of testimony in criminal cases must be determined, is the law of the State, as it was when the Courts of the United States were established by the Judiciary Act of 1789."

To the same effect are LOGAN v. U. S., 144 U. S., 303, and MAXEY v. U. S., 207 Fed. 327.

The language of the opinion in the Logan case is conclusive upon the point in issue:

> "The competency of Spear to testify is equally clear. He was convicted and sentenced in Texas and the full pardon of the *governor of the state*, although granted after he had served out his term of imprisonment thenceforth took away all disqualifications as a witness and restored his competency to testify to any facts within his knowledge, even if they came to his knowledge before his disqualification had been removed."

VI. That the common law rule excluding the testimony of a person who had been convicted of an infamous crime prevailed in the State of New York at the date of the passage of the Judiciary Act of September 4th, 1789, is evidenced by reference to

PART IV, CHAPTER I, TITLE 7, SECTION 23, REVISED STATUTES, 1829
PREFACE, REVISED STATUTES, 1829
PEOPLE v. McGLOIN, 91 N. Y. 241
PEOPLE v. HERRICK, 13 Johns. 82
HILTS v. COLVIN, 14 Johns. 182

In *People* v. *Whipple*, 9 Cow., 708 (1827), DUER, C. J., observed:

> "But it is now well settled, on better principles, that it is the crime and not the punishment, which creates the infamy and destroys the competency of the witness."

22 The charge of forgery in the second degree upon which the witness whose testimony was objected to was convicted, is an infamous crime within the meaning of the common law rule.

Greenleaf in his Treatise on Evidence, Section 373, specifies forgery as one of the *crimen falsi* which work disqualification. To the same effect are REX v. DAVIS, 5 Mod., 75; EX PARTE WILSON, 114 U. S. 417; BUTLER v. THE PETITIONERS, 17 L. R. A. 764, and RE CLASSEN, 140 U. S. 200.

23 The Circuit Court of Appeals in the instant opinion says:

> "It is too late to raise that question (the competency of the witness' testimony) in this Court. We passed upon the question in Rosen v. Wagner, decided at this Term and not yet reported. In its facts it is similar to this."

In the Rosen case the Court, after mentioning that this same witness (Broder) whose testimony was erroneously admitted at the trial of
24 your petitioner, had been sentenced to Elmira Reformatory after a conviction in the General Sessions of New York, of the crime of forgery in the second degree states:

> "Sending him to Elmira was for the purpose of reforming him if possible and should not have the stigma of a prison sentence for a term of years."

Further in the opinion the following observation is made:

> "The tendency of modern thought is to-

wards the abolition of archaic rules which undertook to declare arbitrarily who were or who were not entitled to credence as witnesses and who should be absolutely debarred from taking the stand. All this is changed, and now in most enlightened and progressive jurisdictions the tendency is to receive all the testimony bearing upon the issue irrespective of the character of the witness who gives it. 25

No authority is cited for this stand by the learned Court. 26

VII. That the opinion in the present case insofar as it depends upon the correctness of the Rosen case, is further erroneous in that at common law not the actual punishment inflicted, but the nature of the crime, works the disqualification.

In PEOPLE v. WHIPPLE, supra, it had been objected that the witness Strang having been convicted of an infamous crime, was an incompetent witness. Said the Court, "At the present date, therefore, a conviction of treason or felony or of any specie of *crimen falsi* would incapacitate the party convicted from giving evidence while it continues in force regardless of the punishment inflicted." 27

U. S. v. YATES, 6 Fed. 861, cited and followed People vs. Whipple, and in PEOPLE v. PARK, 41 N. Y. 21, it appeared that a witness for the prosecution had been convicted of burglary in the third degree when he was under the age of sixteen, and sentenced to the House of

28 Refuge. The opinion as announced by JAMES, J., reaches the following conclusion:

> "I therefore hold that burglary, in the third degree, is a felony no matter what may be the age of the convict or whether the particular prisoner may or may not be punishable therefor in the House of Refuge."

VIII. That the decision of the Circuit Court of Appeals is also erroneous insofar as it is grounded upon the desirability of reform re-
29 specting the rules governing the admissibility of evidence. It is submitted that though reform be most desirable and beneficent, yet since Congress has not acted in the matter the learned Court is bound to observe the established rules however ancient they may be or however far back they take their origin.

IX. That the decision of the Circuit Court of Appeals erred insofar as it holds that privately owned and controlled receptacles for the deposit of letters by agents of the Post Office is properly under the jurisdiction of the Federal Government
30 instead of the State or Municipal authorities, and insofar as the decision stands for that proposition it runs counter to the rule laid down in U. S. v. PARSONS, 2 Blatchf. 104, which is that

> "After the voluntary termination of the custody of a letter by the postoffice or its agents, the property in and the right of possession to it belong wholly to its real proprietor and his rights are under the guardianship of the local law and not of that of the United States."

To the same effect is U. S. v. SAFFORD, 66 Fed. 942, where it is stated: 31

> "It is desirable, of course, to protect correspondence from publicity through the instrumentality of prying, officious and evil disposed persons, after, as well as before it comes into the manual possession of those for whom it is intended; but the Federal Government has exhausted its power in this direction when it has established such regulations as may occur to it as efficient, so long as the mail is in its actual custody en route." 32

The doctrine is re-affirmed in U. S. v. LEE, 90 Fed. 256, which held that the duty of the postal authorities is discharged when they comply with the instructions of the sender and deliver the letter to the designated person or at the designated place.

> "Where the duty of the postoffice ends it would seem that its protection generally would end also." 33

U. S. v. HUILSMAN, 94 Fed. 486, is to like effect.

X. That it is of grave importance that the question of competency of witnesses convicted of a felony in the State Court be finally settled and determined by this Court because the question is one which is likely frequently to arise, and the distinction arbitrarily introduced by the case of BROWN v. U. S., 233 Fed. 353, based upon the

independence of Federal and State sovereignty and the decision in the Rosen case, *supra*. based upon the nature of the punishment, has introduced into Federal procedure a dangerous element of confusion.

XI. That the error of the Circuit Court of Appeals in the present case has worked grave injustice in view of the fact that the Government depended almost entirely upon the incompetent testimony for proof of guilty knowledge on the part of your petitioner, allowing, in effect, a character otherwise unassailable to be besmirched by one whose dishonesty and utter lack of integrity had been expressly adjudicated upon, who had pleaded guilty as charged in the joint indictment in the case at bar, and who is at the present time serving sentence in the Elmira State Reformatory.

XII. That the issue of Federal jurisdiction is one of great importance because it involves a construction of the Federal Constitution, Art. I, Sec. 8, and furthermore the urgency of a final determination of the said issue arises from the increasingly widespread use of privately owned and controlled mail boxes as the final receptacles for delivery of matter theretofore sent through the United States mails.

WHEREFORE your petitioner prays that this Honorable Court shall cause a Writ of Certiorari to issue pursuant to the power vested in this Court by the Judicial Code of the United States, requiring the District Court of the Eastern District of New York to certify the whole record and cause to this Court for its consideration, and

that thereon this Court will decide the matter in controversy, in favor of the plaintiff-in-error, the petitioner herein, and that your petitioner may have such relief and remedy in the premises as to this Court may seem appropriate and just. 37

VICTOR PAKAS.

State of New York, }
County of New York, } ss.:
Southern District of New York. }

VICTOR PAKAS, being duly sworn, says, that he is the petitioner in the above proceeding; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true. That this petition is made in good faith and not for the purpose of delay. 38

VICTOR PAKAS.

Sworn to before me this 26th day of February, 1917. 39

CARRIE E. SOUWEINE,
Notary Public,
Kings County, No. 182.

Certificate filed New York County, No. 520, Kings County, Register No. 8168, New York County, Register No. 8431.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and is entitled to the favorable consideration of this Court.

TERENCE J. MCMANUS.

40 SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1916.

No. —.

VICTOR PAKAS,
Petitioner,
against
41 UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Facts.

The appellant, together with one Broder, was indicted, charged with violations of the Criminal Code, §194, through buying and receiving certain drafts which had previously been unlaw-
42 fully taken from mail matter theretofore deposited in the mails of the United States for mailing and delivery by the Postoffice authorities of the United States (Trans. fols. 18, 19, 20).

The mail matter in issue was taken from boxes attached within office buildings, under the exclusive control of their owners or lessees, and to which the Federal Government had access only for the purpose of terminating its custody by delivery therein (Trans. fols. 97-100).

Counsel for petitioner called the learned Court's attention to these facts and vigorously objected to the exercise of jurisdiction in view

thereof (Trans. fols. 111-120). The objection was overruled (Trans. fol. 120) and exception duly taken (Trans. fols. 121, 139, 320).

Prior to the trial the indictment had been severed as to Broder, and the case continued against the petitioner, the Government calling Broder as its witness. It appeared that he had been previously sentenced to more than one year's imprisonment in the Elmira State Reformatory upon a conviction for forgery in the second degree, an infamous crime and a felony. The record of that conviction was produced in open Court (Trans. fols. 47, 358) and counsel for appellant promptly objected to the admission of his testimony on the ground that it was incompetent because of the conviction (Trans. fols. 42-48), but the objection was overruled (Trans. fols. 48-51) and exception duly noted (Trans. fol. 50).

The testimony of Broder was vitally material, and upon it exclusively the Government depended to establish guilty knowledge on the petitioner's part respecting the source of the drafts which came into his hands. But for that testimony, the record is clear of proof impugning his good faith, and it contains ample evidence by mouth of the Government's own witnesses of his honesty and integrity (Trans. fols. 165, 180,

Preliminary.

Your petitioner is aware of this Court's expression that "it is solely questions of gravity and importance that the Circuit Courts of Appeals should certify to us for instruction, and that it is only when such questions are involved that the power of this Court to require a case in which the judgment and decree of the Court of Appeals is made final, to be certified, can be properly invoked."

> *LAU OW BEW*, Petitioner, 141 U. S., 583, 587.

Argument will first be directed to the subject of error, whereupon the inquiry will be "whether the matter is of sufficient importance in itself, and sufficiently open to controversy, to make it the duty of this court to issue the writ applied for in order that the case may be reviewed and determined as if brought here on appeal on writ of error."

POINT I.

The decision of the Circuit Court is erroneous.

(a) THE FEDERAL COURT WAS WITHOUT JURISDICTION OVER THE OFFENSE ~~TO BE SOLVED~~ ought proved. (Sixth Assignment of Error, Trans. fol. 32.)

Assuming that Broder's testimony was competent (which is denied), the offense proved was that the checks received had been abstracted

from mail taken out of privately owned and controlled boxes fixed within buildings, receptacles at the mouth of which the carriers parted with custody of letters as completely as though they had been deposited in the hands of the addressees or upon the trays of their servants. The delivery of the matter at such places of deposit brought it within the protection of state or municipal law and terminated the interest of the Federal Government therein.

The Departmental Order No. 8571 of the Post Office Department purports to transform those receptacles into duly authorized depositories, thereby bringing them under the operation of §194 of the Criminal Code (Trans. fols. 112, 113). What Congress itself could not do the head of the Post Office Department, acting under color of its fiat, cannot accomplish. (R. S. §161, 17 Op. Atty. Gen. 52, Campbell vs. U. S., 107 U. S., 407.)

The vast weight of Federal authority is against the view of the Circuit Court of Appeals, and though the precise facts have not been adjudicated upon, cases indistinguishable in point of law, leave the decision in question substantially without support or precedent.

§194 of the Act of March 4th, 1909, 35 Stat. L. 1125, is as follows:

> "Sec. 194. (STEALING, SECRETING, EMBEZZLING, ETC., MAIL MATTER OR CONTENTS.) Whoever shall steal, take or abstract, or by fraud or deception obtain, from or out of any mail, postoffice, or station thereof or other authorized depository for mail matter, or from a letter or mail

carrier, any letter, postal card, package, bag, or mail, or shall abstract or remove from any such letter, package, bag, or mail, any article or thing contained therein, or shall secrete, embezzle, or destroy any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or whoever shall buy, receive, or conceal, or aid in buying, receiving, or concealing, or shall unlawfully have in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been stolen, taken or embezzled, or abstracted, as herein described, knowing the same to have been so stolen, taken, embezzled, or abstracted * * * shall be fined not more than two thousand dollars, or imprisoned not more than five years, or both."

Attention is respectfully called to R. S. §§3892 and 5469, which relate to similar or identic offenses and the construction of which is of important relevance to the case at bar.

"Section 3892: Any person who shall take any letter, postal card or packet, although it does not contain any article of value or evidence thereof, out of a postoffice or branch postoffice, or from a letter or mail carrier, or which has been in any postoffice or branch postoffice or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with a design to obstruct the correspondence, or shall secrete, embezzle, or destroy the same, shall, for every such offense, be punishable by a fine of not more than

$500, or by imprisonment at hard labor for not more than one year, or by both."

"Section 5469: Any person who shall steal the mail, or take from or out of any mail or postoffice, branch postoffice, or other authorized depository for mail matter, any letter or packet; any person who shall take the mail, or any letter or packet therefrom, or from any postoffice, branch postoffice, or other authorized depository for mail matter, with or without the consent of the person having custody thereof, and open, embezzle, or destroy any such mail, letter or packet, which shall contain any note, bond, draft, check, etc., any person who shall, by fraud or deception, obtain from any person having custody thereof, any such mail, letter, or packet containing any such article of value shall, although not employed in the postal service, be punishable by imprisonment at hard labor for not less than one year and not more than five years."

In the light of these sections and the decisions and opinions thereunder, are the private boxes from which letters are allegedly extracted, duly authorized depositories of mail? They were not. They cannot be under the Federal Constitution, Article I, Sec. 8, providing that "Congress shall have power * * * to establish postoffices and post roads." It is urged by the Government that the Post Office Department had issued the following order No. 8571:

"Any letter-box, or other receptacle intended or used for the receipt or delivery

> of mail matter on any said delivery route, rural delivery route, star route or other mail route is hereby designated a letter-box for the receipt or delivery of mail matter within the meaning of the Act of March 4, 1909."

The order was without effect upon the character of receiving boxes privately owned and controlled. Those had been and still remain beyond the scope of departmental authority and Federal jurisdiction.

U. S. v. PARSON, 2 Blatchf. 104.

There, the facts were that a letter had been directed to an addressee of the same name as that of the defendant, delivered to the defendant's house, opened by the defendant, and its contents wrongfully appropriated by him. The question was whether the defendant was chargeable with the offense defined in Section 3892 (supra).

> "The facts found by the special verdict are within the letter of the statute. What, then, is the true import and force of the phrase, 'shall have been in a postoffice or in the custody of a mail carrier,' and of the phrase 'before it shall have been delivered to the person to whom it is directed'? Are they of unlimited extent, covering every condition of a letter until it reaches its rightful destination? To give the language this construction would be to continue letters which had been once in the mail under the

control of the Federal Government, in every change and transfer, from person to person and place to place, and without limitation of time. *Legislation of such a scope and extent would clearly not be in furtherance of the functions and duties of the Post Office Department but in protection of the private property of individuals after it had become detached from that department and wholly out of the charge of its agents.* Such legislation would thus, necessarily, take the quality and form of municipal regulation governing the relations and responsibility of individuals to each other in respect to letters and their contents which had been in the postoffice, although not obtained from the postoffice or any of its agents, or in the possession of a party through any act of fraud or deceit against the postoffice laws. And Congress would, in effect, be invested with the power to compel every person, into whose possession a letter which had been in the postoffice should come, to take upon himself the responsibility of carrying and delivering it to the person to whom it should be directed. We think that the object of this 22nd section does not look beyond a possession of letters obtained wrongfully from the postoffice or from a letter carrier. Its design is to guard the postoffice and its legitimate agents in the execution of their duties in the safekeeping and delivery of letters. *After the voluntary termination of the custody of a letter by the postoffice or its agents, the property in and the right of possession to it belong wholly to its real pro-*

prictor and his rights are under the guardianship of the local law and not of that of the United States. * * * In our opinion it was not intended that the Act of Congress in question should apply any longer than while the letter should be within the power and control of that (the postoffice) department."

U. S. v. DRISCOLL, 1 Lowell, 303.

In that case Judge Lowell had occasion to pass upon the construction of the same clause. The question was whether the servant of an addressee was indictable thereunder, he having duly received from an agent of the Post Office Department letters subsequently misappropriated by him.

"The scope and purpose of this clause and of the whole section appear to be to protect the mails from every kind of danger *while in the custody of the United States.* Some of the language is broad enough to include within its literal meaning, every letter that has ever been in a postoffice, and every person that can deal with any such letter before it reaches the manual possession of its owner. Taken literally, the first clause is broad enough to cover even the person to whom the letter is addressed. But the law must have a reasonable construction, and one in accordance with the subject matter, which is the due and proper custody and delivery of the mail. It must be taken to refer to letters with which the United States have

concern under their power and duty to transport and deliver the correspondence of the country. * * * I have considered this question once before. A letter had been left *at a shop, where the letters of the same person to whom the particular letter was addressed were, with his knowledge and consent, usually left.* A stranger—the defendant—intermeddled with such a letter after such delivery, and was indicted under the latter clause above cited; and, the case being by consent submitted to me in a somewhat informal way, I ruled upon it, and the result was a *nol. pros.*"

U. S. v. *THOMA*, 25 Int. Rev. Rec., 171.

Under the same section the defendant there was indicted for embezzling a letter theretofore placed in the postoffice, before the same had been delivered to the addrssee. The letter was sent in care of the defendant. Judge Nixon ruled:

"*The design of the section is to guard the inviolability and safety of communications through the mails from the start to their destination.* Any tampering with a letter *during that period*, either by an officer of the department or by other person, with the design to obstruct the correspondence, or pry into the business or secrets of another, or any such secretive embezzlement or obstruction of the same, is carefully guarded against.

U. S. v. *SANDER*, 5 McLean, 518.

The application of Section 3892 (supra) to embezzlement by the addressee's agent was under consideration. In the course of the decision announced by Judge Wilson, the following observation was made:

> "A letter, packet or other valuable thing, having been committed to the Post Office Department for carriage and delivery, if once parted with by the postmaster to a person authorized to receive it, from that moment ceases alike to be under the control of the department and the power and authority of the general government. *The sanction by the Federal Court of the contrary doctrine would be dangerous in its tendency and subversive of reserved State authority.* No power is given to Congress to legislate upon the subject, except what is incident to and necessary to carry out the grant contained in the 8th section of the first article of the Constitution. The grant is simply 'that Congress shall have power to establish postoffices and post roads,' and, while we would not adopt the limited and narrow construction given to this grant by President Monroe in his special message to Congress of the 4th May, 1832, we would not extend implied powers further than what is necessary to carry out with safety to the public the legitimate operations of the post-office establishment. When the functions of the department are exhausted by a proper delivery of mail matter (once placed in its charge), such mail matter is then beyond the

reach and authority of any legislation of Congress."

U. S. v. *SAFFORD*, 66 Fed. 942.

There the letter had been taken from the desk of the addressee where it had been placed by the carrier according to his custom. PRIEST, D. J., delivered the opinion, reviewing the Parsons, Driscoll, Thoma and Sander cases:

"In the foregoing cases the letters were delivered to persons authorized to receive them, while here the letter which the defendant stole was left by the carrier according to the usual custom of delivery, upon the desk in the office of the person to whom it was directed. This, it is contended, makes a material difference. We do not think so. The one was physical and moral depository, while the other merely a physical. *Each was the appointed receptacle of the person addressed, and the delivery to either was an acceptance by the person addressed and the acquittal of the Post Office Department of its obligation with respect to the mail. Whenever the Post Office Department or its agents voluntarily parts with the mail, that is the end of the relation to and authority over it.* Of course, if one by deceitful or artful practice should persuade a mail agent to deliver to him correspondence that he was not lawfully entitled to receive, it would be an offense under the statute, because his artifice would give quality and character to the act, and the de-

ceitful persuasion stands as a coercive and unlawful taking. But whatever one party approves or acquiesces in as an acceptance and the other recognizes as a delivery must be acknowledged and enforced as a delivery by the Courts. In this case, unless we should hold that placing the letter upon the desk, as it was by the carrier, was a delivery (of which there can be not the slightest doubt), we should be compelled to hold that it had been abandoned by the carrier, and for this the statute prescribes a punishment which would seem to be adequate to insure fidelity upon the part of the carriers and postoffice agents. *It is desirable, of course, to protect correspondence from publicity through the instrumentality of prying, officious and evil disposed persons, after, as well as before it comes into the manual possession of those for whom it is intended; but the Federal government has exhausted its power in this direction when it has established such regulations as may occur to it as efficient, so long as the mail is in its actual custody en route. The mere fact that it has had a mission to perform with respect to such correspondence does not invest letters with the quality of Federal interest or concern which ever afterwards entitles it to exert its authority to protect them.* They still remain private property, and subject to the ordinary rules of such property. The postoffice is merely an agent for the delivery of the mail, and has only the right to protect itself in the discharge of this function against the depredations of its agents

> and others while performing its undertaking. However desirable it may be, and however strong may be the policy which would suggest it, that the mail shall be kept sacred, we can look to Congress for efficient aid only so far as it may have authority as incidental to its proprietary and constitutional right to establish 'postoffices and post roads.' *The enforcement of general regulations of police must come from the State.*"

The analogy between a desk top in a private office and a private mail box to which the owner alone has free and lawful access, is a striking one. In both instances, the agents of the post-office department abandon all interest in or control over the letter or packet delivered by placing it in or upon a receptacle completely within the exclusive domain of the addressee. To the private box, as well as the desk top, applies the principle vigorously outlined in the Safford case.

The indictment, together with the admission of the United States District Attorney in open Court, and the demurrer to the indictment, raised the question in U. S. vs. Lee (90 Fed. 256): "Where a letter is directed to 'L. B. Price in care of Kimball House, Atlanta, Georgia,' and the letter is delivered at the office of the Kimball House, is in the office of the hotel awaiting delivery to Price, and the letter is unlawfully, wrongfully and fraudulently taken therefrom and secreted, is the person taking the same subject to indictment and punishment under Section 3892 of the Revised Statutes of

the United States?" It was held, per Newman, D. J.:

> "The duty of the postal authorities is discharged when they comply with the instructions of the sender, and deliver the letter to the designated person or at the designated place. *Where the duty of the post-office department ends it would seem that its protection generally would end also.*"

Accordingly, it was ruled that on the facts, no case was made which would authorize a prosecution.

It was urged in United States vs. Meyers (142 Fed. 907) that Section 5469 (*supra*) applied to a case where the defendant, whose name was identical with the addressee's, innocently received the letter in question and thereafter embezzled its contents. Said Quarls, D. J., speaking for the court:

> "Section 5469 is a conspicuous example of a statute which does not completely define the offense it creates. * * * Careful analysis of the second clause of Section 5469 giving full effect to the conjunction 'and' where it occurs in said second clause, will disclose the fact that Congress had in mind three essential elements of this offense: First: A 'taking' of mail matter from a postal official with or without the consent of a proper custodian. Second, the opening, embezzlement or destruction of such letter. Third, that the matter so misappropriated contained certain papers 'or documents therein described."

The indictment was held fatally defective.

United States vs. Huilsman (94 Fed. 486), and United States vs. Bullington (170 Fed. 121), are in strict accord with the preceding cases. In the former, Adams, J., observed:

> "When the postal authorities have fully discharged their duties, by delivery to the person to whom or in whose care it was addressed, they have fully discharged their functions, and in my opinion have gone as far as Congress has authorized them to go. Whatever offense the defendant has committed, if any, in this case, it is one which may be cognizable under State law, but is not under the United States law."

In the Bullington case, the same principle was expressed by Hundley, D. J., page 123.

But one case is in discord with the vast body of authorities supporting the view that the construction contended for by the prosecution would place the statute beyond the pale of Congressional power. That case is U. S. vs. M'Cready, 11 Fed. 225, which was decided on the grounds of public policy and the supposed precedent of U. S. vs. Hall, 98 U. S. 343.

It is respectfully submitted that public policy, insofar as it involved in the case at bar, is adequately protected by the State laws, and, in any event, the true interests of public welfare can never demand that the punishment of a particular wrong be secured through an encroachment upon the limitation which the law has set on the functions and powers of the several departments of government.

Nor was the Hall case a precedent for the M'Cready decision. There, a guardian had embezzled pension money delivered to him for the use of his ward. The distinction between the instant and that case is obvious. The whole purpose of the pension law is bound up with the personality of the recipient of the pension. The receipt of the actual benefit by him and not the method of transmission, as in the postal laws, is the essence of the pension acts. The governmental interest in pensions begins where it ends in postal affairs. The attitude of the Federal Courts towards the doctrine enunciated in the M'Cready decision is amply evidenced by the quotations hereinbefore noted.

The learned Circuit Court of Appeals places the private mail receptacle in the same category as receptacles for rural free delivery routes. There is a patent distinction. Those boxes are erected under the direct authority of the Post-Office Department, acording to official specifications. (§824 Postal Rules & Regulations.) Delivery therein is deposit in a publicly designated and placed receptacle to which the Post-Office Department and the addressee alike have free access, and over which the latter has no control or interest save to take therefrom matter deposited by the carrier.

No further ground is urged other than the general desirability of protecting mail, a factor which entered prominently into each of the cases hereinbefore cited and by each with one exception subordinated to the far more important consideration of jurisdictional limitation.

b. The admission of the testimony of Samuel Broder was reversible error.

(First, Second and Fifth Assignments of Error.)

A person who has been duly convicted of and sentenced for an infamous crime by the Courts of the State of New York is incompetent to testify at the trial of a criminal case before the United States District Court for the ~~Southern~~ Eastern District of New York.

It was an uncontroverted fact that on or about the 28th day of January, 1914, the witness was convicted of the crime of burglary in the second degree at the Court of General Sessions in the County of New York and that thereupon sentence was imposed by Hon. Charles C. Nott, Jr., Justice of the said Court, in accordance with which the defendant was imprisoned in the New York State Reformatory at Elmira for a period of more than one year.

1. THE CONTROLLING RULE IS THAT TESTIMONY, INCOMPETENT IN A CRIMINAL ACTION BY THE COMMON LAW OF THE STATE OF NEW YORK IN 1789, IS AND HAS EVER SINCE BEEN INCOMPETENT IN A FEDERAL COURT EXERCISING CRIMINAL JURISDICTION IN THE STATE OF NEW YORK.

U. S. vs. Reid, 12 How., 361;
Logan vs. U. S., 144 U. S., 303;
Maxey vs. U. S., 207 Fed., 327.

In the Reid case it has been urged that the competency of witnesses in criminal trials before Federal Courts was governed by the current laws of the State within whose boundaries the action was brought. This involved the question of the scope of the 34th Section of Chapter 27 of the Judiciary Act of September 24th, 1789, providing that the laws of the several states, except

where the constitution, treaties or statutes of the United States otherwise required or provided, shall be regarded as rules of decision, in trials at Common Law, in the Courts of the United States, in cases where they apply. Delivering the opinion of the Court, Mr. Chief Justice Taney said (page 363):

> "But we think it (the rule, by which the Courts of the United States are to be governed, in the admission of testimony in criminal cases) may be found with sufficient certainty, not indeed, in direct terms, but by necessary implication, in the Acts of 1789 and 1790, establishing the Courts of the United States, and providing for the punishment of certain offenses. And the law by which, in the opinion of this Court, the admissibility of testimony in crimnal cases must be determined, is the law of the state, as it was when the Courts of the United States were established by the Judiciary Act of 1789."

Logan vs. United States raises an issue similar to that in the Reid case. The decision contains a resume of relevant Congressional legislation enacted between the statutes passed in 1789 and Section 858 of the Revised Statutes. The latter is a consolidation of the act of July 2nd, 1864, Chapter 210; the Act of March 3rd, 1865, Chapter 115; and the Act of 1862, Chapter 189. Mr. Justice Gray concluded the point in issue in the course of the decision announced by him:

> "The provisions of Section 858 of the Revised Statutes, that 'the laws of the State

> in which the Court is held shall be the rules of decision as to the competency of witnesses in Courts of the United States in trials of Common Law, and in equity and admiralty, has no application to criminal trials; and therefore in criminal trials in the Courts of the United States held within the State of Texas is not governed by a Statute of the State which was first enacted in 1858, but, except so far as Congress has made specific provisions upon the subject, is governed by the Common Law, which, as has been seen, was the law of Texas before the passage of that Statute and at the time of the admission of Texas into the Union as a State.

The case of Maxey vs. United States (*supra*), like the instant one, came before the Courts upon an indictment based on an offense relating to the Uited States Mail Service and raised the matter of the competency of a witness who had been convicted of a felony. Said the Court through Carland, C. J.:

> "The competency of witnesses to testify in criminal cases in the Courts of the United States is determined by the Common Law, except where Congress in special cases may otherwise provide. (Logan vs. U. S., 144; U. S., 263. . . . It . . . appears that there has been no legislation by Congress changing the rule of the Common Law as to the competency of witnesses in criminal cases in the Courts of the United States except in special instances not material in this case. . . . It is urged in the brief of counsel for the United States that Con-

gress has passed no law making the conviction of crime a disqualification. This is an erroneous view to take of the matter. The Common Law prevails until Congress shall decide otherwise. The Courts of the United States were organized and their jurisdiction defined, but the matter of the competency of witnesses has never been legislated upon by Congress except as to civil cases, and there is no rule upon the subject unless we go to the Common Law."

There has been no departure from this rule down to the case of *Brown vs. United States* (233 Fed., 353). The court there introduces an innovation to the effect that a conviction in a State Court does not bear upon the competency of a witness in the Federal Court, the two jurisdictions being independent and incidental to separate and distinct sovereignties. The opinion is irreconcilable with those hereinbefore cited. The general rule is that the disqualification is territorial. The Logan case (*supra*) permits of no other conclusion. The following language of the opinion leaves nothing further to be said in respect to this phase of the question:

> "The competency of Spear to testify is equally clear. He was convicted and sentenced in Texas and the full pardon of the governor of the State, although granted after he had served out his term of imprisonment, thenceforth took away all disqualifications as a witness and restored his competency to testify to any facts within his knowledge, even if they came to his knowledge before his disqualification had been removed."

The original trial was before the District Court for the Northern District of Texas. Obviously if the pardon of the governor of the state removed the witness' incompetency there must have been some incompetency to remove. The incompetency referred to is that resulting from a conviction in the State Courts of Texas. That appears from the record and also from the fact that it is the only kind of conviction from the effects of which the witness could have been relieved by the pardon of the state governor.

It may be that the law relative to incompetency of witnesses is archaic, unfair and ill-grounded. But it is with deference urged that though this be true, that law is clear, definite and positive and the reform or abolition thereof is not within the domain of a court whose function is that of interpreting and applying existing legal rules.

It is respectfully submitted that the Brown decision is completely at variance with the principles well settled by repeated declarations of the Supreme Court of the United States, goes far byond the field of judicial construction, well into that of legislation, and is without support of precedent or sound legal reason.

2. THE COMMON LAW RULE, EXCLUDING THE TESTIMONY OF A PERSON WHO HAD BEEN CONVICTED OF AN INFAMOUS CRIME, PREVAILED IN THE STATE OF NEW YORK AT THE DATE OF THE PASSAGE OF THE JUDICIARY ACT OF SEPTEMBER 4TH, 1789.

Part IV, Chapter I, Title 7, Section 23, Revised Statutes, 1829;
Preface, Revised Statutes, 1829;

People vs. McGloin, 91 N. Y., 241;
People vs. Herrick, 13 Johns. 82;
Hilts vs. Colvin, 14 Johns. 182.

The legislation affecting the Colony and State of New York and the Laws enacted by its legislature have been searched in vain, down to the Revised Statutes of 1829 for a modification of the Common Law rule respecting the competency of witnesses once convicted of a felony. That this rule persisted intact at least until 1829, is borne out by reference to Part IV, Chapter I, Title 7, Section 23, R. S. 1829.

> "No person sentenced upon a conviction of felony shall be competent to testify in any cause, matter or proceeding, civil or criminal, unless he be pardoned by the Governor or by the Legislature, except in cases specially provided by law; but no sentence upon a conviction for any offense other than a felony, shall disqualify or render any person incompetent to be sworn or to testify in any cause, matter or proceeding, civil or criminal."

The incorporation of such a rule into the statutory law of the State is explained by the revisers in their preface to Volume I of the Revised Statutes of 1829:

> "In numerous instances, also, the rules of the Common Law have been reduced to a written text and inserted in their proper places in connection with the statutory provisions of the subject to which they relate;

> whilst in other instances those rules have been enlarged, modified or varied the more fully to conform them with the nature of our government and the habits and exigencies of the people."

The significance of the incorporation is illustrated in Carpenter vs. Nixon, 5 Hill. 266, where it was pointed out that the provision expressly saving from disqualification persons convicted of any offense other than a felony, modifies the result of a conviction for petit larceny which, at Common Law, was a felony and as such, in common with *crimen falsi*, was followed by disqualification; but not under the Revised Statutes, because it was not punishable by death or imprisonment in a State prison. The conclusion that the Common Law rule remained unaltered up to 1829 is perfectly consistent with the adjudications on the subject made prior to that date.

In People vs. McGloin (*supra*), it was claimed that the witness was incompetent to testify in a case, by virtue of the provisions of the Revised Statutes (Vol. 3, Banks, 6th Ed., page 994, Section 43, Title 7) which embodied the pre-existing law in terms practically identical with those used in the Revised Statutes of 1829, quoted, *supra*.

In the course of a consderation of the effect of the remedial Section 832, Code of Civil Procedure, the Court, per Parker, J., observed (page 250):

> "Both at common law and by statute a witness becomes disqualified only after sentence rendered upon a conviction of felony."

It was not deemed a matter of controversy in People vs. Herrick (1816) or Hilts vs. Colvin (1817) whether a convicted felon was incompetent. That he was so was assumed by both sides and the issue hinged on the method of proving conviction. Attention is also directed to People vs. Whipple (1827), discussed, *infra*, where Duer, C. Judge, observed:

> "But it is *well settled*, on better principles, that it is the crime and not the punishment, which creates the infamy and destroys the competency of the witness."

3. THE CHARGE OF FORGERY IN THE SECOND DEGREE UPON WHICH THE WITNESS WAS CONVICTED IS AN INFAMOUS CRIME WITHIN THE MEANING OF THE COMMON LAW RULE.

> *Wharton on Criminal Law*, page 62;
> *Greenleaf, Evidence*, Sec. 373;
> *Rex vs. Davis*, 5 Mod., 75;
> *State vs. Candler*, 10 N. C., 393;
> *Ex Parte Wilson*, 114 U. S., 417;
> *United States vs. Smith*, 40 Fed., 755;
> *Butler vs. The Petitioners*, 17 L. R. A., 764.

The witness had been convicted upon the charge of forging a check. This was forgery at Common Law according to Wharton's definition:

> "The offense is consummated by the making of a false document on which suit might be brought."

The question whether conviction for forgery works incompetency is thus answered by Greenleaf.

> "It is a point of no small difficulty to determine precisely the crimes which render the perpetrator thus infamous. The rule is justly stated to require that 'the *publicum judicium* must be upon an offense, implying such a dereliction of moral principle, as carries with it a conclusion of a total disregard to the obligation of an oath' but the difficulty lies in the specification of those offenses. The usual and more general enumeration is treason, felony and the *crimen falso*. . . . It has been adjudged that persons are rendered infamous and therefore incompetent to testify by having been convicted of *forgery*, perjury, etc."

In Rex vs. Davis, and State vs. Candler, the incompetency of a witness who had been convicted of forgery was declared. The subject was broached from a different angle in Ex Parte Wilson (*supra*) where the point in contest was whether a certain crime was infamous within the sense of the Fifth Amendment to the Federal Constitution. Mr. Justice Gray, expressing the judgment of the Court, stated:

> "The scope and effect of this (the Fifth amendment), as of many other provisions of the Constitution, are thus ascertained by bearing in mind what the law was before Mr. William Eden (afterwards Lord Auckland) in his principles of Penal Law which

passed through three editions in England and at least one in Ireland within six years before the Declaration of Independence, observed 'there are two kinds of infamy; the one founded in the opinion of the people respecting the mode of punishment; the other in the construction of law respecting the future credibility of the delinquent'. Eden's Principles of Penal Law, Chapter 7, Section 5.

"At the time it was already established law, that the infamy which disqualified a convicted party as witness depended upon the character of his crime, and not upon the nature of his punishment. Pendock vs. Mackider, Willes 665; Gibb. Ev. 143; 2 Hawk., Chap. 46, sec. 102; The King vs. Priddle, 1 Leach, 4th Edition, 442). The disqualification to testify appears to have been limited to those adjudged guilty of treason, felony, *forgery* and crimes injuriously affecting by falsehood and fraud the administration of justice, such as perjury, etc. 1 Greenl. Ev., Sec. 373; Utley vs. Merick, 11 Met. 302; Fox vs. Ohio, 5 How., 410, 433, 434."

Foster, J., delivered the opinion of the Court in Butler vs. The Petitioners, and in the course of a comprehensive review of pertinent authorities, declared:

> "An infamous crime is that which works infamy in the person who has committed it. The law writers inform us that by the principles of the Common Law, the person thus rendered infamous by the conviction of such crime was incompetent as a witness.

> The law considered his oath to be of no weight and excluded his testimony as of too doubtful and suspicious a nature to be admitted in Court to deprive another of life, liberty or property. . . . Thus at Common Law, the crimes which rendered persons incompetent were treason, felony, *forgery*, etc. . . . The purport of all the decisions from the highest Court in this country, since Ex Parte Wilson, is that a crime punishable by imprisonment in the State prison or penitentiary, whether the accused is or is not sentenced to hard labor, is an infamous crime; and in determining this the question is whether it is one for which the statute authorizes the Court to award an infamous punishment and not whether the punishment actually imposed is an infamous one. Citing re Classen, 140 U. S. 200, 205."

d. NOT THE ACTUAL PUNISHMENT INFLICTED BUT THE NATURE OF THE CRIME WORKS DISQUALIFICATION.

The nature of the crime is determined by the infamy which attaches to it and one gauge of that infamy is the punishment by which the offense *may* be penalized. But the specific punishment meted out to a particular wrongdoer is irrelevant to the question whether or not his offense falls within the category of infamous crimes where that offense is, by law, punishable as a felony or is one of the *crimen falsi*. Forgery is punishable by a maximum imprisonment of ten years (N. Y. Laws of 1909, Chapter 88, Section 888); as a felony (L. 1909, Chapter 88, Sec. 2); and at

Common Law is regarded as one of the *crimen falsi*. Consequently a conviction for forgery followed by judgment suffices to render incompetent as a witness the person so convicted and upon whose conviction judgment has been pronounced.

People vs. Whipple, 9 Cow., 708;
U. S. vs. Yates, 6 Fed., 861;
Ex Parte Wilson, supra;
People vs. Park, 41 N. Y., 21;

In People vs. Whipple it had been objected that the witness Strang, having been convicted of an infamous crime, was an incompetent witness. Said Duer, C. J.:

> "The disability of Strang to give testimony is urged, in the first place, on the ground of the legal infamy resulting from his conviction. This infamy was formerly held to arise from two sources—the conviction of certain offenses and the infliction of certain penalties. The *mere conviction*, properly evidenced, of some crimes was always sufficient, as it is at present, to render the offender infamous; whilst some punishments of a peronally degrading character had also the same effect, *whatever the crimes might be for which they were inflicted*. But it is now well settled, on better principles, that it is *the crime and not the punishment*, which creates the infamy and destroys the competency of the witness. (co. Lit. 6 a and b, 2 Hale, 277. Com. Dig. Testmoisne 5. Bull. N. P. 291. 1 Leach, 442. Peake's Ev. 149. Bac. Abr. Ev. A. 6, Willes,

> 666. 2 Wils. 18. 2 Salk. 690). At the present date, therefore, a conviction of treason, or felony or of any specie of the *crimen falsi* will incapacitate the party convicted from giving evidence while it continues in force, regardless of the punishment inflicted. Hawkins, b. 2, c. 46. 1 Phil. Ev. 16. 1 Chitty's Crim. Law, 600, and authorities there cited."

United States vs. Yates came before the District Court of the Eastern District of New York. The decision delivered by Benedict, D. J., cites and follows People vs. Whipple, *supra*.

The facts of People vs. Parks, supra, as stated in the opinion by James, J., were:

> "The defendants in error were arraigned on an indictment for burglary and pleaded not guilty. On the trial, one Corbin was offered as a witness for the prosecution, and objected to as incompetent; it being shown that he had been previously convicted and sentenced for the crime of burglary in the third degree and had never been pardoned or restored to his rights as a citizen. It also appeared, that, at the time of such conviction, said Corbin was under the age of 16 years, and was sentenced to the House of Refuge. An objection was overruled; the witness admitted and gave material testimony, and the prisoners were convicted.
>
> "The Revised Statutes declare the term 'felony' where used therein, to mean an offense for which the offender, on conviction, shall be liable by law to be punished by death

> or imprisonment in a State prison. (2 R. S., 702, Sec. 30). The term 'offender,' in such section is not used as a word of limitation, making it dependent upon the personal status of the criminal, or his exemption from a particular punishment by reason of age or mental incapacity where the offense (of which he is convicted) is a felony; but as a word of general application in a general sense, to define the punishment following the crime. * * * I therefore hold that burglary, in the third degree, is a felony no matter what may be the age of the convict or whether the particular prisoner may or may not be punishable therefor *in the House of Refuge.*"

Two exceptions appear among the list of authorities supporting the principles hereinbefore set forth under the instant topic. One is Rosen vs. Wagner, a decision of this same court to which the ~~present~~ herein was appeal ~~is~~ taken, concerning the competency of the same witness, Broder, and appearing in the New York Law Journal of November 29, 1916. The opinion was announced by Coxe, J. After stating the facts noted in the preliminary statement hereof, the following appears:

> "Was Broder a competent witness?
>
> "He was at the time of his trial about 18 years of age and was sent to the Elmira Reformatory. No time limit was fixed by the sentence. The trial judge in the case at bar considered it the equivalent of a suspended sentence. We are unable to find

an authority exactly in point, but we think the decision in the court below was in accordance with the trend of modern opinion."

The attention of the court is respectfully called to the People vs. Whipple, United State vs. Yates; Exparte Wilson and People vs. Park hereinbefore cited, which are precisely in point, involving the identical principle, which is determinative of the present issue. Particular notice is urged in respect to People vs. Park, where the age of the witness at the time of his conviction was under 16 years, and the place of commitment the House of Refuge. The opinion goes on:

"Broder was not of age at the time, and was convicted of the crime of forgery. Sending him to Elmira was for the purpose of reforming him, if possible, and should not have the stigma of a prison sentence for a term of years. The theory upon which Elmira was founded and is operated was to reform and save young men who have perhaps thoughtlessly entered upon a course of wrong doing. It is a school and reformatory. It is not a prison. It would be a misfortune if it were held that proof of a sentence to Elmira alone disproves a witness and stigmatizes him for all time as a person unworthy of credence. The *raison d'etre* of the reformatory is the direct opposite of this; it is to reform and not to punish, to uplift and encourage and help young men sent there."

It is respectfully submitted that the age of the witness at the time of his conviction was not a factor in the Common Law rule relating to in-

competency. While sending him to Elmira may have been for the purposes of reforming him, yet it is also true that one of the chief purposes of every kind of penal institution is a correctional and reformative one, the difference in modern penological methods being one of slight degree, so that the same argument the learned court applies to Elmira would apply equally to Sing Sing. Incidentally, it should be observed here that however reformative the purpose of Elmira might have been, it is a matter of record that Broder was just as much a forger and just as much uncurbed with respect to his moral perversion after he came out as when he went in. The fact remains that the suggested distinction is irrelevant, for it is the crime and not the punishment, which under the common law, determines the competency of a witness. Perhaps it is a misfortune that proof of a sentence to Elmira alone disqualifies a witness, but such has been the well settled law in the Federal courts, and the change, if any, should come from the legislature. The opinion continues:

> "We know of no case where a commitment to Elmira has been held to disqualify a witness, and see no reason why an exception should be made of the present case."

It may be that there is no case where a commitment to Elmira has disqualified a witness. If that is so, it is because the same facts had not previously been presented to the learned court, and not because there was a special rule governing commitments to reformatories. There can hardly be an exception unless there is a rule.

But in another sense the decision of the learned Court was decidedly an exception, for while the particular facts themselves were without exact precedent, they were not without strong and parallel analogy. They called merely for the application of a well-settled doctrine which had been consistently adhered to theretofore.

The final paragraph of the opinion relates to the desirability of reform, and as to that, it is sufficient to say that though the reform be most desirable and beneficent, yet since Congress has not acted in the matter, this court is bound to observe the archaic and perhaps outworn rules of the ancient law.

The other exception is Brown vs. U. S., 233 Fed. 353, cited in the decision in issue. That case introduces the proposition that the difference between State and Federal sovereignty is reason for declining to hold a witness, who had been convicted of an infamous crime in a state court, disqualified from testifying in a Federal court.

The refinement is opposed to the holdings of the Supreme Court, and particularly U. S. vs Reid and Logan vs. U. S. (*supra*) and is contrary to the wording and spirit of the Judiciary Act of 1789, *supra*. Without basis in precedent or legal reason itself it can hardly furnish precedent or legal justification for a subsequent pronouncement.

4. IT IS SUBMITTED THAT THE ERRONEOUS ADMISSION OF THE TESTIMONY OF SAMUEL BRODER, WAS, IN THE FIRST PLACE, HIGHLY PREJUDICIAL TO THIS DEFENDANT, AND IN THE SECOND PLACE THAT IN THE ABSENCE OF SAMUEL

BRODER'S TESTIMONY THERE WAS NO PROOF, WHATEVER, WARRANTING THE ASSUMPTION THAT THIS DEFENDANT HAD KNOWLEDGE OF ANY IRREGULARITY IN THE METHODS WHEREBY THE CHECKS AT ISSUE CAME INTO SAMUEL BRODER'S POSSESSION.

Victor Pakas claims that Broder was introduced to him as a man of means who would assist him in his trouble. Broder alone contradicts that claim. Pakas states that he never saw Broder forge an endorsement. Broder alone denies this. Upon Broder's version of the destruction of a returned check and the transaction between himself and Pakas in the Tombs, the prosecution relies to discount the explanation given by Pakas of those circumstances. Strike out Broder's testimony and no jury could reasonably have found Pakas culpable under the indictment, for the very essence of the crime charged—namely, guilty knowledge—would have remained unproven.

POINT II.

The matter is sufficiently important, and sufficiently open to controversy to warrant the issuance by this court of a writ of certiorari.

This branch of the jurisdiction of the Supreme Court should be exercised "in cases of *peculiar gravity and general importance*, or in order to *secure uniformity of decision.*" *American Const. Co. vs. Jacksonville Ry.*, 148 U. S. 372, 383.

> "Whenever circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to *correct excesses of jurisdiction* and in *furtherance of justice.* Tidds' Prac. *398; Pac. Ab., Certiorari." *In Re Chetwood,* 165 U. S. 443, 462.

Further examples of such circumstances are the necessity of avoiding conflict between *"two or more Courts of Appeal,* or between Courts of Appeal and the Courts of a State, or where some matter affecting the interests of this nation in its internal or external relations, demands such exercise." *Forsyth vs. Hammond,* 106 U. S. 506, 514.

(a) WHETHER OR NOT THE FEDERAL COURT HAD JURISDICTION OVER THE OFFENCE SOUGHT TO BE PROVED IS A CONSTITUTIONAL QUESTION OF FAR MORE THAN ACADEMIC INTEREST.

The protection of mail matter is a subject of grave importance. For more or less extended periods of time a large part of all mail matter rests within a receptacle designated as the place where the deposit of letters is regarded by the addressee as sufficient delivery. If the protection of letters so deposited is of public concern then surely it is of equal concern to determine upon whom falls the responsibility for the furnishing of such protection.

The issue is sharply outlined in this case. On the one hand it is urged that the Post Office Department may bring under the wing of Federal solicitude "any letter box or other receptacle intended for use for the receipt * * * of mail

matter on any said delivery route," which includes a metal box built into the wall of a building with a slit wherein the carrier may drop letters and to which other lawful access may alone be had by use of a key in the owner's exclusive possession, or a wire basket hung within an office door into which a carrier may drop letters through a slot in the panel—the entire basket being removed with its contents each morning to the addressee's desk.

On the other hand it is urged that the definition of "mail" in *Searight vs. Stokes*, supra, is an accurate one; that Federal jurisdiction is coextensive with custody for the purpose of conveyance and distribution; that once the act of delivery effectuates distribution and terminates custody by placing the matter beyond Federal control and under the exclusive dominion of private individuals Federal jurisdiction ends, ceases and terminates absolutely. Beyond that point no Federal law is violated by tampering with or destruction of the matter. Local statutes alone are violated and the United States District Court was without jurisditcion.

Thus it appears that one of the issues involved here is of great public concern and presents a serious question of jurisdiction which bids fair to be mooted often in view of the increasing use of private repositories for mail.

(b) THE COMPETENCY OF A WITNESS PREVIOUSLY CONVICTED OF AN INFAMOUS CRIME MERITS FINAL ADJUDICATION BECAUSE THERE IS CONFLICT AMONG THE LOWER COURTS. FINAL ADJUDICATION IS DESIRABLE BECAUSE THE QUESTION MUST FREQUENTLY ARISE IN CRIMINAL TRIALS AND THE RULE IS BE-

FOGGED WITH UNCERTAINTY ARISING FROM NOVEL AND ARBITRARY DISTINCTIONS, AND GRAVE INJUSTICE HAS BEEN WROUGHT BY THE COURT BELOW WHICH CANNOT BE CORRECTED SAVE BY THE INTERPOSITION OF THIS COURT.

The Circuit Court of Appeals holds that the witness Broder, convicted of forgery in the second degree, a felony by the law of the State of New York, in New York General Sessions, and sentenced to Elmira State Reformatory, was a competent witness in a Federal criminal proceeding

The decision is grounded on two cases. *Rosen vs. U. S.*, decided on similar facts in the same term, and *U. S. vs. Brown, supra.*

The Rosen case held that the witness was competent because he was sentenced to a Reformatory, which as the name implies is a reformative institution and committment there raises a presumption that the process of reformation has been completed. By way of passing comment it may be said that this same witness was he who admittedly stole the letters, the contents of which this petitioner is alleged to have unlawfully received, and hat he is once more within the confines of Elmira. But aside from that, the irrelevancy of [illegible] punishment to disqualification is fixed and settled.

Maxey vs. U. S., 207 Fed. 327.
People vs. Yates, 6 Fed. 861

With this and the other cases referred to the decision of the Circuit Court of Appeals is in direct conflict. That decision is further grounded upon *Brown vs. U. S.*, supra, where the proposition as stated above is for the first time enunciated that the disability arising from infamy is not territorial but attaches to the witness or

not according to the sovereignty represented by the Court in which he seeks to testify, a conviction in a State Court being without effect in a Federal Court with co-eval jurisdiction. It has been pointed out that the Rosen and Brown cases directly conflict with *U. S. vs. Reid,* 12 How. 361, and *Logan vs. U. S.,* 144 U. S. 303, and the line of authorities following those leading cases.

Apparently the learned Circuit Court is conscious of the revolutionary character of its decision, for it quotes enough of the prior holding in the Rosen case to reveal the motive underlying its pronouncement there and in the case at bar.

> "The tendency of modern thought is toward the abolition of the archaic rules which undertook to declare who were and who were not entitled to credence as witnesses, and who should be absolutely debarred from taking the stand. *All this is changed* and now in most enlightened and progressive jurisdictions the tendency is to receive all the testimony bearing upon the issue, respective of the character of the witness who gives it. Proof of the commission of a crime discredits a witness but it does not absolutely exclude him from the witness stand."

This is indeed progressive. The first sentence apparently refers to the settled rules as archaic. The second sentence describes with approval the changes (obviously legislative) which have been made in certain jurisdictions. The third sentence forthwith judicially declares those legislative changes operative in Federal jurisdiction.

The decision carries upon its face an intentional conflict with practically every case whether in the Supreme Court or the Circuit Court of Ap-

peals, which embodies the law respecting the competency of convicted and unpardoned felons.

(c) THE FREQUENCY WITH WHICH THIS QUESTION HAS ARISEN IN THE PAST AND MUST ARISE IN THE FUTURE CALLS FOR AN EXPRESS ADJUDICATION UPON THE SUBJECT SETTLING ONCE AND FOR ALL TIME THE PROPER PRACTICE IN THE ABSENCE OF CONGRESSIONAL ACTION.

(d) THE IMMEDIATE RESULT OF THE ACTION OF THE DISTRICT COURT AS ENDORSED BY THE CIRCUIT COURT OF APPEALS HAS BEEN TO WORK A COLOSSAL AND IRREPARABLE INJUSTICE.

An unassailable reputaion for truth, honor and integrity, attested to even by the Government's own witnesses, was besmirched and destroyed by one whose moral perversion, utter faithlessness and viciousness were and are adjudicated facts. And upon that individual alone the Government depended for proof of guilty knowledge which distinguishes innocence from crime.

The opportunity to minimize the wrong which has been wrought is by and of itself sufficient warrant for interposition of this Court by the issuance of a writ, one of the chief purposes of which is to further the ends of jujstice in behalf of an aggrieved and otherwise remediless person.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1917.

VICTOR PAKAS,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.
No. 438.

Brief for Petitioner.

TERENCE J. MCMANUS,
Of Counsel for Petitioner.

INDEX.

PAGE

Statement of Facts 1-5

Point I. 5-19
(First, Second and Fifth Assignments of Error.)

Point 2. 19-38
(Sixth Assignment of Error.)

Cases Cited:

Brown vs. U. S., 223 Fed., 353.....13
Butler vs. The Petitioners, 17 L. R. A., 764..11
Campbell vs. United States, 107 U. S., 407...34
Carpenter vs. Nixon, 5 Hill, 260.....10
Fox vs. Ohio, 5 How., 410-433-434.....12
Hilts vs. Colvin, 14 Johns, 182..... 9-10
King, The, vs. Priddle, 1 Leah., 4th Ed., 442.12
Logan vs. U. S., 144 U. S., 303 20-23
Morey vs. U. S., 207 F. R., 327..... 7-15
Pendock vs. MacKidder, Willes, 665 12
People vs. Herrick, 13 John, 82..... 9-10
People vs. McGloin, 91 N. Y., 241..... 8-10
People vs. Whipple, 9 Cowen, 708.....15-16
Rex vs. Davis, 5 Mod., 75.....11
Rosen & Wagner vs. U. S., 237 Fed., 811....14
R. R. vs. Smith, 9 Wallace, 95 35
State vs. Candler, 10 N. C., 393.....11
United States vs. Bullington, 170 Fed., 121..20-31
United States vs. Driscoll, 1 Lowell, 303....20-24
United States vs. Hall, 98 U. S., 343.....31
United States vs. Huilsman, 94 Fed., 486...20-31
United States vs. Lee, 90 Fed., 256.....20-29
United States vs. M'Cready, 11 Fed., 225...31
United States vs. Meyers, 142 Fed., 907....20-30
United States vs. Parson, 2 Blatchf., 104...20-23
United States vs. Reid, 12 Howard, 361..... 5
United States vs. Sander, 5 McLean, 518...20-26
United States vs. Smith, 40 Fed., 755.....11
United States vs. Stafford, 66 Fed., 942 20-27
United States vs. Thoma, 25 Int. Rev. Rec., 171 20-25
Utley vs. Merick, 11 Met., 302.....12
Wilson, Ex parte, 114 U. S., 417.....11-12

Supreme Court of the United States

OCTOBER TERM, 1917.

VICTOR PAKAS,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.
No. 438.

Statement.

This writ of certiorari brings up for review, the judgment of the United States Circuit Court of Appeals in and for the Second Circuit affirming a judgment of the District Court of the United States for the Eastern District of New York, following the conviction of the petitioner above named upon an indictment charging him with knowingly receiving property which had been stolen from the mails (folios 7-134, Transcript of Record). Upon the conviction aforesaid, the petitioner was duly sentenced to imprisonment in the United States Prison at Atlanta, Georgia, (folio 9). The writ of certiorari herein was granted on the 7th day of April, 1917.

There are two questions presented for consideration by this learned Court, in regard to both of which, a direct conflict of decision is presented.

These questions are:

1. Whether a witness who had been convicted of an infamous crime in a State Court and who had not been pardoned, should be permitted to testify upon the trial of a criminal action in a District Court in a State where the Common Law rule excluding felons as witnesses, obtained at the time of the passage of the Judiciary Act of 1789. (1st, 2nd and 5th Assignments of Error).

2. Whether the jurisdiction of the Post Office Department extends over private mailing boxes or receptacles situated in loft or office buildings, which boxes or receptacles are within the exclusive control of the owners or tenants of the building and to which the Postal authorities have no access except to deliver mail thereto; these boxes not being used for the deposit of mail to be collected for ultimate distribution by the Postal authorities. (6th Assignment of Error).

The common law rule excluding the testimony of a person who had been convicted of an infamous crime prevailed in the State of New York at the time of the passage of the Judiciary Act of 1789; and should have controlled the Trial Court upon the question of the admissibility of the testimony of the witness, Broder.

The question of the competency of a felon as a witness was of distinct importance in the case at bar, because of the fact that the Government's case depended largely and (insofar as the question of guilty knowledge went) exclusively upon the testimony of a convicted criminal. This witness, Samuel Broder by name, had been jointly

indicted with the petitioner, had pleaded guilty and was called as a witness by the prosecution.

It was conceded that he, Broder, had theretofore been convicted of the crime of forgery in the second degree in the Court of General Sessions of the County of New York, a Court of record of the State of New York having criminal jurisdiction, and that he had thereafter been sentenced to imprisonment in the State Reformatory at Elmira, N. Y. (fols. 15-17 Trans.) Appropriate objection and exception was taken to the admission of testimony of this witness (folios 15 to 17).

The witness told of meeting the petitioner Pakas through mutual acquaintances. He testified that he had been stealing matter from the mails for these other acquaintances, and that he had been turning over checks that had been contained in the stolen mail matter to them, dividing the spoils when the checks were paid. He testified that Pakas told him that he was in serious financial difficulties, and that a mortgage on his home was about to be foreclosed; Pakas urged him to help him; he agreed; it was arranged that he, Broder, would steal letters from private depositories in office and loft buildings, and in such instances where they contained checks, turn over the checks upon an agreement for a division of the proceeds. Thereafter he claims that he stole a number of letters from these depositories and turned over the checks, after forging the endorsements of the payees thereon, to Pakas (fols. 20-28 Trans). The witness frankly admitted on cross examination that after his arrest and while he was in prison awaiting trial, he sent for Pakas and asked for money; that Pakas refused to give him any. That after this, he turned against Pakas. He further stated that if he had received

money from Pakas he "would have shielded him as much as possible" (folio 51 Trans.)

Other witnesses were called who testified that they had received certain checks from Pakas, which checks the witness Broder swore he had stolen from the mails and, after forging the endorsements, had delivered to Pakas. In every instance, it appeared that Pakas either presented the checks personally to these witnesses, or had endorsed the same prior to delivery. He used them to pay merchandise debts, or in reduction of the mortgage that was about to be foreclosed on his home (fols. 52-68). Several of these witnesses testified to the good reputation which Pakas bore in the community.

Pakas' story was radically different from that told by Broder. He told of his introduction to Broder and of his being advised that Broder was a man of means who could and would help him. He described the receipt of certain checks from Broder and the circumstances surrounding their receipt; also his visit to the attorney for the mortgagee; of his endorsing the checks and delivering them to the various parties who testified for the prosecution. He also described his course of conduct when later he learned that the checks were stolen and that the endorsements were forged. It is clearly established that he did not profit to the extent even of one dollar by the transactions; also that he repaid, in instances where credit had been given him, the amount of the various checks which he had received or used (folios 76-83 Trans.)

It is almost inconceivable that any merchant, no matter how inexperienced, having knowledge of the tainted source of these checks would have had the temerity to use them under the conditions disclosed by the proof in this case. Disclosure

was sure and certain and prompt in every instance. When the checks were returned to the owners after having been paid, they would know at once that they had been diverted from their proper course and with Pakas' name endorsed on each of them, there was no escape for him under the circumstances. It is, therefore, reasonable to conclude that his story as to the circumstances of his receiving the checks and his lack of knowledge as to their source is the true one.

In any event, the questions presented assume a graver importance in view of the good character which the defendant bore. If these questions had been correctly decided, the case would never have been submitted to a jury for determination.

POINT I.

The testimony of the witness Broder was not competent and it was prejudicial error to admit it. (1st 2nd and 5th assignments of error)

A.

1. THE RULE GOVERNING THE ADMISSIBILITY OF TESTIMONY IN CRIMINAL CASES.

The law by which the admissibility of testimony upon the trial of criminal cases in the District Courts of the United States must be determined, is the law which obtained in the particular State at the time when the Judiciary Act of 1789 was enacted.

This was the rule laid down in *United States* vs *Reid*, 12 Howard 361. In that case it was urged that the competency of witnesses in criminal trials before Federal Courts was governed by the law which obtained in the State *at the time*

the action was tried. Mr. Chief Justice Taney in delivering the opinion of the Court met this contention with the following:

> (page 363):
>
> "But we think it (the rule, by which the Courts of the United States are to be governed, in the admission of testimony in criminal cases) may be found with sufficient certainty, not indeed, in direct terms, but by necessary implication, in the Acts of 1789 and 1790, establishing the Courts of the United States, and providing for the punishment of certain offenses. *And the law by which, in the opinion of this Court, the admissibility of testimony in criminal cases must be determined, is the law of the state, as it was when the Courts of the United States were established by the Judiciary Act of 1789.*"

The reasons for the conclusion reached by the learned Court are carefully and convincingly presented, the Court saying:

> "The Courts of the United States have uniformly acted upon this construction of these Acts of Congress, and it has thus been sanctioned by a practice of sixty years. They refer undoubtedly to English works and English decisions. For the law of evidence in this country, like our other laws, being founded upon the ancient common law of England, the decisions of its courts show what is our own law upon the subject where it has not been changed by statute or usage. But the rules of evidence in criminal cases, are the rules which were enforced in the respective

States when the Judiciary Act of 1789 was passed. *Congress may certainly change it whenever they think proper* within the limits prescribed by the Constitution. But no law of a State made since 1789 can effect the mode of proceeding or the rules of evidence in criminal cases."

In *Logan* vs. *U. S.*, 144 U. S., 303, the doctrine enunciated in the Reid case, *supra*, was expressly reaffirmed, the Court saying:

> "The provisions of Section 858 of the Revised Statutes, that 'the laws of the State in which the Court is held shall be the rules of decision as to the competency of witnesses in Courts of the United States in trials of Common Law, and in equity and admiralty, has no application to criminal trials; and therefore in criminal trials in the Courts of the United States held within the State of Texas is not governed by a Statute of the State which was first enacted in 1858, but, except so far as Congress has made specific provisions upon the subject, is governed by the Common Law, which, as has been seen, was the law of Texas before the passage of that Statute and at the time of the admission of Texas into the Union as a State."'

In *Morey* vs. *U. S.*, 207 F. R., 327, the same rule was again enunciated, the Court saying:

> "The competency of witnesses to testify in criminal cases in the Courts of the United States is determined by the Common Law, except where Congress in special cases may otherwise provide. (Logan vs. U. S., 144;

> U. S., 263. * * * It * * * appears that there has been no legislation by Congress changing the rule of the Common Law as to the competency of witnesses in criminal cases in the Courts of the United States except in special instances not material in this case. * * * It is urged in the brief of counsel for the United States that Congress has passed no law making the conviction of crime a disqualification. This is an erroneous view to take of the matter. The Common Law prevails until Congress shall decide otherwise. The Courts of the United States were organized and their jurisdiction defined, but the matter of the competency of witnesses has never been legislated upon by Congress except as to civil cases, and there is no rule upon the subject unless we go to the Common Law."

We have therefore a clear cut, definite and precise rule which, as will now appear, absolutely forbids the introduction of testimony of a person who had been convicted of a felony under the circumstances disclosed in the instant case.

> 2. THE COMMON LAW RULE, EXCLUDING THE TESTIMONY OF A PERSON WHO HAD BEEN CONVICTED OF AN INFAMOUS CRIME, PREVAILED IN THE STATE OF NEW YORK AT THE DATE OF THE PASSAGE OF THE JUDICIARY ACT OF SEPTEMBER 4TH, 1789.

Part IV, Chapter I, Title 7, Section 23, Revised Statutes, 1829;
Preface, Revised Statutes, 1829;
People vs. *McGloin*, 91 N. Y., 241;

People vs. *Herrick*, 13 Johns. 82;
Hilts vs. *Colvin*, 14 Johns. 182.

The legislation affecting the Colony and State of New York and the Laws enacted by its legislature have been searched in vain, down to the Revised Statutes of 1829 for a modification of the Common Law rule respecting the competency of witnesses once convicted of a felony. That this rule persisted at least until 1829, is borne out by reference to Part IV, Chapter I, Title 7, Section 23, R. S. 1829.

> "No person sentenced upon a conviction of felony shall be competent to testify in any cause, matter or proceeding, civil or criminal, unless he be pardoned by the Governor or by the Legislature, except in cases specially provided by law; but no sentence upon a conviction for any offense other than a felony, shall disqualify or render any person incompetent to be sworn or to testify in any cause, matter or proceeding, civil or criminal."

The incorporation of such a rule into the statutory law of the State is explained by the revisers in their preface to Volume I of the Revised Statutes of 1829:

> "In numerous instances, also, the rules of the Common Law have been reduced to a written text and inserted in their proper places in connection with the statutory provisions of the subject to which they relate; whilst in other instances those rules have been enlarged, modified or varied the more

> fully to conform them with the nature of our government and the habits and exigencies of the people."

The significance of the incorporation is illustrated in *Carpenter* vs. *Nixon*, 5 Hill. 260, where it was pointed out, that the provision expressly saving from disqualification, persons convicted of any offense other than a felony, modifies the result of a conviction for petit larency which, at Common Law, was a felony and as such, in common with *crimen falsi*, was followed by disqualification; but not under the Revised Statutes, because it was not punishable by death or imprisonment in a State prison. The conclusion that the Common Law rule remained unaltered up to 1829 is perfectly consistent with the adjudications on the subject made prior to that date.

In *People* vs. *McGloin* (*supra*), it was claimed that the witness was incompetent to testify in a case, by virtue of the provisions of the Revised Statutes (Vol. 3, Banks, 6th Ed., page 994, Section 43, Title 7) which embodied the preexisting law in terms practically identical with those used in the Revised Statutes of 1829, quoted, *supra*.

In the course of a consideration of the effect of the remedial Section 832, Code of Civil Procedure, the Court, per Parker, J., observed (page 250):

> "Both at common law and by statute a witness becomes disqualified only after sentence rendered upon a conviction of felony."

It was not deemed a matter of controversy in *People* vs *Herrick* (1816) or *Hilts* vs. *Colvin* (1817) whether a convicted felon was incompe-

tent. That he was so was assumed by both sides and the issue hinged on the method of proving conviction.

3. THE CHARGE OF FORGERY IN THE SECOND DEGREE UPON WHICH THE WITNESS WAS CONVICTED IS AN INFAMOUS CRIME WITHIN THE MEANING OF THE COMMON LAW RULE.

Wharton on Criminal Law, page 62;
Greenleaf, Evidence, Sec. 373;
Rex vs. *Davis*, 5 Mod., 75;
State vs. *Candler*, 10 N. C., 393;
Ex Parte Wilson, 114 U. S., 417;
United States vs. *Smith*, 40 Fed., 755;
Butler vs. *The Petitioners*, 17 L. R. A., 764.

The question whether conviction for forgery works incompetency, is thus answered by Greenleaf:

> "The rule is justly stated to require that 'the *publicum judicium* must be upon an offense, implying such a dereliction of moral principle, as carries with it a conclusion of a total disregard to the obligation of an oath' but the difficulty lies in the specification of those offenses. The usual and more general enumeration is treason, felony and the *crimen falso*. * * * It has been adjudged that persons are rendered infamous and therefore incompetent to testify by having been convisited of *forgery*, perjury, etc."

In *Rex* vs. *Davis*, and *State* vs. *Candler*, the incompetency of a witness who had been convicted of forgery, was declared. The subject was ap-

proached from a different angle in *Ex Parte Wilson* (*supra*) where the point in contest was whether a certain crime was infamous within the sense of the Fifth Amendment to the Federal Constitution. Mr. Justice Gray, expressing the judgment of the Court, stated:

> "The scope and effect of this (the Fifth amendment), as of many other provisions of the Constitution, are thus ascertained by bearing in mind what the law was before Mr. William Eden (afterwards Lord Auckland) in his principles of Penal Law, which passed through three editions in England and at least one in Ireland within six years before the Declaration of Independence, observed: 'there are two kinds of infamy; the one founded in the opinion of the people respecting the mode of punishment; the other in the construction of law respecting the future credibility of the delinquent.' Eden's Principles of Penal Law, Chapter 7, Section 5.
>
> "At the time it was already established law, that the infamy which disqualified a convicted party as witness, depended upon the character of his crime, and not upon the nature of his punishment. Pendock vs. Mackider, Willes 665; Gibb. Ev. 143; 2 Hawk., Chap. 46, sec. 102; The King vs. Priddle, 1 Leah, 4th Edition, 442). The disqualification to testify appears to have been limited to those adjudged guilty of treason, felony, *forgery* and crimes injuriously affecting by falsehood and fraud the administration of justice, such as perjury, etc. 1 Greenl. Ev., Sec. 373; Utley vs. Merick, 11 Met. 302; Fox vs. Ohio, 5 How., 410, 433, 434."

B.

THE CASES IN WHICH A CONFLICT OF DECISION IS DISCLOSED.

The first instance in which the rule laid down in the Reid, Logan and Maxey cases is departed from, is disclosed in *Brown* v. *U. S.*, 223 Fed., 353.

The court there drew this distinction, namely: that federal courts being courts of an entirely different sovereignity, a conviction in a state court rendering a person incompetent to testify in the State Court, does not affect his competency to testify in a federal court, any more than it would in a foreign jurisdiction.

It is respectfully submitted that this conclusion is in absolute variance with the principle enunciated in each of the cases cited. Besides this the distinction which the learned Court draws is wholly artificial as well as illogical. It ignores the basic factor upon which the rule in these cases was founded.

The spirit of the rule in the Logan case was clearly violated. In that case the witness whose testimony was objected to, had been convicted in a *State Court* in Texas. This court in holding that the testimony was competent, based its ruling upon the ground that the disqualification had been removed by the pardon granted by the Governor of the State of Texas. The inference is irresistable that had the pardon not been granted, this court would have ruled that the testimony should have been excluded.

The Court said in the Logan case:

> "The competency of Spear to testify is equally clear. He was convicted and sen-

> tenced in Texas and the full pardon of the governor of the State, although granted after he had served out his term of imprisonment, thenceforth *took away all disqualifications as a witness and restored his competency to testify* to any facts within his knowledge, even if they came to his knowledge before his disqualification had been removed.

The original trial was before the District Court for the Northern District of Texas. Obviously if the pardon of the governor of the state removed the witness' incompetency, there must have been some incompetency to remove. The incompetency referred to, is that resulting from a conviction in the State Courts of Texas. That appears from the record and also from the fact that it is the only conviction from the effects of which the witness could have been relieved by the pardon of the state governor.

The viewpoint of Mr. Justice Ward, writing the dissenting opinion in the Rosen & Wagner case, (237 Fed. 811), is much more logical and convincing in its presentation of the territorial quality of the judgment of the State Court.

He says:

> "There is no question in this case of enforcing the judgment of the state court. It has been completely enforced. The question is as to its effect when offered in evidence. That a judgment of conviction in a state court should have one quality as evidence in the state courts and quite a different one in the federal courts is not illogical. When the sovereigns differ, one must yield; and the

> Supreme Court has persistently held that Congress did not intend the states to control in respect to evidence in criminal cases. Broder, the witness in this case, had been convicted in a court of the State of New York of what was at common law *crimen falsi*, viz., forgery. As the judgment had not been reversed and he had not been pardoned, his testimony should have been excluded. Such is the rule in the federal courts, though not in the courts of New York. If it is antiquated, and the judgment of conviction should go only to the credibility of a witness, Congress and not the courts should make the change. This was the view taken in a similar case by the Circuit Court of Appeals for the Eighth Circuit in *Maxey* v. *United States*, 207 Fed. 327, 125 C. C. A., 77.

In the Rosen & Wagner case, in which precisely the same question which is presented here (involving the competency of the same witness, Broder) was decided, the decision is founded upon a premise which is wholly at variance with the common law rule. The rule is that it is the crime and not the punishment which creates the infamy and destroys the competency of the witness.

> (co. Lit. 6 a and b, 2 Hale, 277. Com. Dig. Testimoisne 5. Bull. N. P. 291. 1 Leach, 442. Peake's Ev. 149. Bac. Abr. Ev. A. 6. Willes, 666, 2 Wils. 18. 2 Salk. 690.

In *People* vs. *Whipple*, 9 Cow. 708, it had been objected that the witness Strang, having

been convicted of an infamous crime, was an incompetent witness. Said Duer, C. J.:

> "The disability of Strang to give testimony is urged, in the first place, on the ground of the legal infamy resulting from his conviction. This infamy was formerly held to arise from two sources—the conviction of certain offenses and the infliction of certain penalties. The *mere conviction*, properly evidenced, of some crimes was always sufficient, as it is at present, to render the offender infamous; whilst some punishments of a personally degrading character had also the same effect, *whatever the crimes might be for which they were inflicted.* But it is now well settled, on better principles, that it is *the crime and not the punishment*, which creates the infamy and destroys the competency of the witness. At the present date, therefore, a conviction of treason, or felony or of any specie of the *crimen falsi* will incapacitate the party convicted from giving evidence while it continues in force, regardless of the punishment inflicted. *Hawkins*, b. 2, c. 46. 1 Phil. Ev. 16. 1 Chitty's Crim. Law, 600, and authorities there cited."

United States vs *Yates* came before the District Court of the Eastern District of New York. The decision delivered by Benedict, D. J., cites and follows *People* vs *Whipple, supra.*

Judge Coxe, writing the opinion in the *Rosen* and *Wagner* cases, holds that notwithstanding the infamous quality of the crime, the nature of the sentence—to a reformatory—removed the stigma of disqualification. He says:

> "It would be a misfortune if it were held that proof of a sentence to Elmira alone disproves a witness and stigmatizes him for all time as a person unworthy of credence. The *raison d'etre* of the reformatory is the direct opposite of this; it is to reform and not to punish, to uplift and encourage and help young men sent there."

It is respectfully submitted that the age of the witness at the time of his conviction was not a factor in the Common Law rule relating to incompetency.

Incidentally, it should be observed here that however reformative the purpose of Elmira might have been, it is a matter of record that Broder was just as much a forger and just as much uncurbed with respect to his moral perversion after he came out as when he went in. The fact remains that the suggested distinction is irrelevant, for it is the crime and not the punishment, which under the common law, determines the competency of a witness. Perhaps it is a misfortune that proof of a sentence to Elmira alone disqualifies a witness, but such has been the well settled law in the Federal courts, and the change, if any, should come from the legislature. The opinion continues:

> "We know of no case where a commitment to Elmira has been held to disqualify a witness, and see no reason why an exception should be made of the present case."

It may be that there is no case where a commitment to Elmira has disqualified a witness. If that is so, it is because the same facts had not

previously been presented to the learned court, and not because there was a special rule governing commitments to reformatories. There can hardly be an exception unless there is a rule.

But in another sense the decision of the learned Court was decidedly an exception, for while the particular facts themselves were without exact precedent, they were not without strong and parallel analogy. They called merely for the application of a well-settled doctrine which had been consistently adhered to theretofore.

The final paragraph of the opinion relates to the desirability of reform, and ,as to that, it is sufficient to say that though the reform be most desirable and beneficient; yet since Congress has not acted in the matter, this court is bound to observe the archaic and perhaps outworn rules of the ancient law.

The ruling in the *Rosen* and *Wagner* cases was followed in the instant case (Opinion of Mr. Justice Rogers, fols. 130, 131).

It is urged that these decisions are in direct conflict with the rule enunciated in the Reid, Logan and Maxey cases, *supra*, and for that reason alone the conviction herein should be set aside.

POINT II.

The jurisdiction of the post-office department does not extend over private receptacles situated in office buildings and which are within the exclusive control of the owners, or tenants, of the buildings and to which the postal authorities have no access except to deliver mail thereto. (Sixth Assignment of Error.)

Assuming that Broder's testimony was competent (which is of course denied) the proof shows that the property stolen, had been abstracted from mail taken from privately owned and controlled boxes attached to the walls of the hall-ways of loft or office buildings (fols. 37-38).

> "I said in answer to the District Attorney that these checks Exhibits 2, 3, 4, 5, and 6, being checks drawn by various persons and corporations to various other persons and corporations I took from boxes; that these boxes were in buildings in the downtown business districts, factory sections, New York. I went into the hallways of the buildings, saw boxes there with the names of the different tenants in the buildings on the boxes, that is right.
>
> Q. And you opened those boxes and those boxes bore the names of the different tenants in these buildings, is that right?
>
> A. Well, some tenants didn't have no locks on them, if they were closed, I didn't have no key. I did not open them. Boxes which I could open I opened up and took out the mail and brought to Pakas' office.

Q. In any event the boxes which you opened were all boxes which were not locked?

A. Some of them.

All of them bore the private name of the person who is the tenant in the building.

Out of these private boxes I took the letters I found there.

I took those letters up to Pakas' place of business.

And the letters were then opened.

Q. That is what you did in every instance with respect to every one of these exhibits, 2 to 7?

A. Some of them, all of them, positively.

In no instance did I ever open a United States mail box on a corner.

I never broke open the mail at all in any way in any of these instances. Only letter boxes.

Q. Only boxes in the building and that bore the name of private mark of tenants in the building?

A. Perhaps there were lots of boxes that had that mark, but I didn't see that. Only stole of letter boxes—

In which the letter carriers would deposit mail."

It is the petitioner's contention that the post-office department had no dominion over these private receptacles; that its jurisdiction over them, terminated when the mail was deposited therein. There is an abundance of authority to support this contention.

United States vs. *Parson*, 2 Blatshf. 104;
United States vs. *Driscoll*, 1 Lowell, 303;

United States vs. *Thoma*, 25 Int. Rev. Rec., 171.
United States vs. *Sander*, 5 McLean, 518.
United States vs. *Sa[illegible]*, 66 Fed. 942;
United States vs. *Lee*, 90 Fed. 256;
United States vs. *Meyers*, 142 Fed. 907;
United States vs. *Huilsman*, 94 Fed. 486;
United States vs. *Bulletin*, 170 Fed. 121.

THE STATUTORY PROVISIONS.

§194 of the Act of March 4th, 1909, 35 Stat. L. 1125, is as follows:

"SEC. 194. (STEALING, SECRETING, EMBEZZLING, ETC., MAIL MATTER OF CONTENTS.) Whoever shall steal, take or abstract, or by fraud or deception obtain, from or out of any mail, postoffice, or station thereof or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or shall abstract or remove from any such letter, package, bag, or mail, any article or thing contained therein, or shall secrete, embezzle, or destroy any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or whoever shall buy, receive, or conceal, or aid in buying, receiving, or concealing, or shall unlawfully have in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been stolen, taken or embezzled, or abstracted, as herein described, knowing the same to have been so stolen, taken, embezzled, or abstracted * * * shall be fined not more than two thousand dollars, or imprisoned not more than five years, or both."

Attention is respectfully called to R. S. §§3892 and 5469, which relate to similar or identic offenses and the construction of which is of important relevance to the case at bar.

> "Section 3892: Any person who shall take any letter, postal card or packet, although it does not contain any article of value or evidence thereof, out of a postoffice or branch postoffice, or from a letter or mail carrier, or which has been in any postoffice or branch postoffice or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with a design to obstruct the correspondence, or shall secrete, embezzle, or destroy the same, shall, for every such offense, be punishable by a fine of not more than $500, or by imprisonment at hard labor for not more than one year, or by both."

> "Section 5469: Any person who shall steal the mail, or take from or out of any mail or postoffice, branch postoffice, or other authorized depository for mail matter, any letter or packet ;any person who shall take the mail, or any letter or packet therefrom, or from any postoffice, branch postoffice, or other authorized depository for mail matter, with or without the consent of the person having custody thereof, and open, embezzle, or destroy any such mail, letter or packet, which shall contain any note, bond, draft, checks, etc., any person who shall, by fraud or deception, obtain from any person having custody thereof, any such mail, letter, or packet containing any such article of value shall, although not employed in the postal service,

be punishable by imprisonment at hard labor for not less than one year and not more than five years."

THE AUTHORITIES.

In the Parson case, supra, the facts were that a letter had been directed to an addressee of the same name as that of the defendant, delivered to the defendant's house, opened by the defendant, and its contents wrongfully appropriated by him. The question was whether the defendant was chargeable with the offense defined in Section 3892 (supra).

"The facts found by the special verdict are within the letter of the statute. What, then, is the true import and force of the phrase, 'shall have been in a postoffice or in the custody of a mail carrier,' and of the phrase 'before it shall have been delivered to the person to whom it is directed'? Are they of unlimited extent, covering every condition of a letter until it reaches its rightful destination? To give the language this construction would be to continue letters which had been once in the mail under the control of the Federal Government, in every change and transfer, from person to person and place to place, and without limitation of time. *Legislation of such a scope and extent would clearly not be in furtherance of the functions and duties of the Post Office Department but in protection of the private property of individuals after it had become detached from that department and wholly out of the charge of its agents.* Such legislation would thus, necessarily, take the quality and

form of municipal regulation governing the relations and responsibility of individuals to each other in respect to letters and their contents which had been in the postoffice, although not obtained from the postoffice or any of its agents, or in the possession of a party through any act of fraud or deceit against the postoffice laws. And Congress would, in effect, be invested with the power to compel every person, into whose possession a letter which had been in the postoffice should come, to take upon himself the responsibility of carrying and delivering it to the person to whom it should be directed. We think that the object of this 22nd section does not look beyond a possession of letters obtained wrongfully from the postoffice or from a letter carrier. Its design is to guard the postoffice and its legitimate agents in the execution of their duties in the safekeeping and delivery of letters. *After the voluntary termination of the custody of a letter by the postoffice or its agents, the property in and the right of possession to it belong wholly to its real proprietor and his rights are under the guardianship of the local law and not of that of the United States.* * * * In our opinion it was not intended that the Act of Congress in question should apply any longer than while the letter should be within the power and control of that (the postoffice) department."

In the Driscoll case, supra, Judge Lowell had occasion to pass upon the construction of the same clause. The question was whether the servant of an addressee was indictable thereunder, he having duly received from an agent of the

Post Office Department letters subsequently misappropriated by him.

> "The scope and purpose of this clause and of the whole section appear to be to protect the mails from every kind of danger *while in the custody of the United States.* Some of the language is broad enough to include within its literal meaning, every letter that has ever been in a postoffice, and every person that can deal with any such letter before it reaches the manual possession of its owner. Taken literally, the first clause is broad enough to cover even the person to whom the letter is addressed. But the law must have a reasonable construction, and one in accordance with the subject matter, which is the due and proper custody and delivery of the mail. It must be taken to refer to letters with which the United States have concern under their power and duty to transport and deliver the correspondence of the country. * * * I have considered this question once before. A letter had been left *at a shop, where the letters of the same person to whom the particular letter was addressed were, with his knowledge and consent, usually left.* A stranger—the defendant—intermeddled with such a letter after such delivery, and was indicted under the latter clause above cited; and, the case being by consent submitted to me in a somewhat informal way, I ruled upon it, and the result was a *nol. pros.*"

In the Thoma case, supra, the defendant was indicted for embezzling a letter theretofore placed

in the postoffice, before the same had been delivered to the addressee. The letter was sent in care of the defendant. Judge Nixon ruled:

> "*The design of the section is to guard the inviolability and safety of communications through the mails from the start to their destination.* Any tampering with a letter *during that period*, either by an officer of the department or by other person, with the design to obstruct the correspondence, or pry into the business or secrets of another, or any such secretive embezzlement or obstruction of the same, is carefully guarded against.

In *U. S.* v. *Sander*, 5 McLean, 518, the application of Section 3892 (supra) to embezzlement by the addressee's agent was under consideration. In the course of the decison announced by Judge Wilson, the following observation was made:

> "A letter, packet or other valuable thing, having been committed to the Post Office Department for carriage and delivery, if once parted with by the postmaster to a person authorized to receive it, from that moment ceases alike to be under the control o fthe department and the power and authority of the general government. *The sanction by the Federal Court of the contrary doctrine would be dangerous in its tendency and subversive of reserved State authority.* No power is given to Congress to legislate upon the subject, except what is incident to and necessary to carry out the grant contained in the 8th section of the first article of the Constitution. The grant is simply

> 'that Congress shall have power to establish postoffices and post roads,' and, while we would not adopt the limited and narrow construction given to this grant by President Monroe in his special message to Congress on the 4th May, 1822, we would not extend implied powers further than what is necessary to carry out with safety to the public the legitimate operations of the post-office establishment. When the functions of the department are exhausted by a proper delivery of mail matter (once placed in its charge), such mail matter is then beyond the reach and authority of any legislation of Congress."
>
> *U. S.* v. ~~Stafford~~ Sanford, 66 Fed. 942.

There the letter had been taken from the desk of the addressee where it had been placed by the carrier according to his custom. PRIEST, D. J., delivered the opinion, reviewing the Parsons, Driscoll, Thoma and Sander cases:

> "In the foregoing cases the letters were delivered to persons authorized to receive them, while here the letter which the defendant stole was left by the carrier according to the usual custom of delivery, upon the desk in the office of the person to whom it was directed. This, it is contended, makes a material difference. We do not think so. The one was physical and moral depository, while the other merely a physical. *Each was the appointed receptacle of the person addressed, and the delivery to either was an acceptance by the person addressed and the acquittal of the Post Office Department of*

its obligation with respect to the mail. Whenever the Post Office Department or its agents voluntarily parts with the mail, that is the end of the relation to and authority over it. Of course, if one by deceitful or artful practice should persuade a mail agent to deliver to him correspondence that he was not lawfully entitled to receive, it would be an offense under the statute, because his artifice would give quality and character to the act, and the deceitful persuasion stands as a coercive and unlawful taking. But whatever one party approves or acquiesces in as an acceptance and the other recognizes as a delivery must be acknowledged and enforced as a delivery by the Courts. In this case, unless we should hold that placing the letter upon the desk, as it was by the carrier, was a delivery (of which there can be not the slightest doubt), we should be compelled to hold that it had been abandoned by the carrier, and for this the statute prescribes a punishment which would seem to be adequate to insure fidelity upon the part of the carriers and postoffice agents. *It is desirable, of course, to protect correspondence from publicity through the instrumentality of prying, officious and evil disposed persons, after, as well as before it comes into the manual possession of those for whom it is intended, but the Federal government has exhausted its power in this direction when it has established such regulations as may occur to it as efficient, so long as the mail is in its actual custody en route. The mere fact that it has had a mission to perform with respect to such correspondence does not invest letters with the quality of Federal*

> *interest or concern which ever afterwards entitles it to exert its authority to proctect them.* They still remain private property, and subject to the ordinary rules of such property. The postoffice is merely an agent for the delivery of the mail, and has only the right to protect itself in the discharge of this function against the depredations of its agents and others while performing its undertaking. However desirable it may be, and however strong may be the policy which would suggest it, that the mail shall be kept sacred, we can look to Congress for efficient aid only so far as it may have authority as incidental to its proprietary and constitutional right to establish 'postoffices and post roads.' *The enforcement of general regulations of police must come from the State.*"

The analogy between a desk top in a private office and in a private mail box to which the owner alone has free and lawful access, is a striking one. In both instances, the agents of the postoffice department abandon all interest in or control over the letter or packet delivered by placing it in or upon a receptacle completely within the exclusive domain of the addressee. To the private box, as well as the desk top, applies the principle vigorously outlined in the Safford case.

The indictment, together with the admission of the United States District Attorney in open Court, and the demurrer to the indictment, raised the question in U. S. vs. Lee (90 Fed. 256): "Where a letter is directed to 'L. B. Price, in care of Kimball House, Atlanta, Georgia,' and the letter is delivered at the office of the Kimball House, is in the office of the hotel awaiting

delivery to Price, and the letter is unlawfully, wrongfully and fraudulently taken therefrom and secreted, is the person taking the same subject to indictment and punishment under Section 3892 of the Revised Statutes of the United States?" It was held, per Newman, D. J.:

> "The duty of the postal authorities is discharged when they comply with the instructions of the sender, and deliver the letter to the designated person or at the designated place. *Where the duty of the post-office department ends it would seem that its protection generally would end also.*"

Accordingly, it was ruled that on the facts, no case was made which would authorize a prosecution.

It was urged in *United States* vs. *Meyers* (142 Fed. 907) that Section 5469 (*supra*) applied to a case where the defendant, whose name was identical with the addressee's innocently received the letter in question and thereafter embezzled its contents. Said Quaris, D. J., speaking for the court:

> "Section 5469 is a conspicious example of a statute which does not completely define the offense it creates. * * * Careful analysis of the second clause of Section 5469 giving full effect to the conjunction 'and' where it occurs in said second clause, will dislose the fact that Congress had in mind three essential elements of this offense: First: A 'taking' of mail matter from a postal official with or without the consent of a proper custodian. Second, the opening, embezzlement

> or destruction of such letter. Third, that the matter so misappropriated contained certain papers 'or documents therein described."

The indictment was held fatally defective.

United States vs. *Hailsman* (94 Fed. 486), and ***United States* vs. *Bullington*** **(170 Fed. 121)**, are in strict accord with the preceding cases. In the former, Adams, J., observed:

> "'When the postal authorities have fully discharged their duties, by delivery to the person to whom or in whose care it was addressed, they have fully discharged their functions, and in my opinion have gone as far as Congress has authorized them to go. Whatever offense the defendant has committed, if any, in this case, it is one which may be cognizable under State law, but it not under the United States law."

In the *Bullington* case, the same principle was expressed by Hundley, D. J., page 123.

But one case is in discord with the vast body of authorities supporting the view that the construction contended for by the prosecution would place the statute beyond the pale of Congressional power. That case is *U. S.* vs. *M'Cready*, 11 Fed. 225, which was decided on the grounds of public policy and the supposed precedent of *U. S.* vs. *Hall*, 98 U. S., 343.

It is respectfully submitted that public policy, insofar as it involved in the case at bar, is adequately protected by the State laws, and, in any event, the true interests of public welfare can never demand that the punishment of a particular wrong be secured through an encroachment

upon the limitation which the law has set on the functions and powers of the several departments of government.

THE ORDER PROMULGATED BY THE POST OFFICE DEPARTMENT TO MEET THIS CONDITION.

The postal authorities have tried to meet the situation created by these decisions by promulgating a departmental order #8571 of the Post-office department, which provides as follows:

> "Any letter-box, or other receptacle intended or used for the receipt of mail matter of said delivery route, stated routes or other mail route is hereby designated a letter-box for the receipt, or delivery, of mail matter within the meaning of the act of March 4th, 1909 (Sec. 194 of the Act of March 4th, 1909, 35 Stat. L. 1125.)"

It is held by the Circuit Court of Appeals in its opinion in the case at bar (fols. 126 to 130) that the order of the Postmaster General is ministerial in its character and wholly within the exercise of the power with which he is invested by law. The Court also says:

> "These authorized depositories of mail are provided for the convenience of the carriers. The Post Office Department even imposes it as a duty upon the recipients of mail to provide along the highway private boxes for the receipt of the mail. In section 824 of the Postal Laws and Regulations it is prescribed that 'Persons desiring rural delivery service shall provide and erect at their own expense boxes conforming to official specifications

> and requirements.' It is not to be supposed that the Government having made it compulsory to furnish such depositories is without the power to protect the mail when it is deposited therein, or that it has failed to exercise its right to protect it against the depredations of the criminal clases. To require the mail to be deposited in such places and then leave it there unprotected would convert these depositories into mere provacative to plunder."

It is respectfully submitted that this reasoning does violence to the conclusion of the Court in all of the cases hereinabove cited. While the order should obtain in rural free delivery where mail is deposited for collection by the department, as well as for delivery, it is urged that it might just as well be maintained by the Court that by department regulation the Government might maintain dominion over letters which had actually been delivered in the offices and on the desks of the addressees as in some of the cases cited.

The learned Circuit Court of Appeals places the private mail receptacle in the same category as receptacles for rural free delivery routes. There is a patent distinction. Those boxes are erected under the direct authority of the Post-Office Department, according to official specifications. (§824 Postal Rules & Regulations.) Delivery therein is deposit in a publicly designated and placed receptacle to which the Post-Office Department and the addressee alike have free access, and over which the latter has no control or interest save to take therefrom matter deposited by the carrier.

No further ground is urged other than the general desirability of protecting mail, a factor which entered prominently into each of the cases hereinbefore cited and by each, with one exception, subordinated to the far more important consideration of jurisdictional limitation.

Assuming that a private receiving box could have been lawfully designated by Congress an authorized depository under Federal jurisdiction, a wholly unsustainable hypothesis, the Postmaster General could not accomplish that result by an executive order.

Sec. 161 R. S. provides:

> "The head of each department is authorized to prescribe requirements, not inconsistent with law, *for the government of his department, the conduct of its officers and clerks, the distribution of its business, and the custody, use and preservation of the records, papers and property appertaining to it.*"

In *Campbell* v. *U. S.*, 107 U. S., 407, *supra*, the plaintiff was an importer and exporter of merchandise within the operation of the Statute providing that an importer of merchandise for exportation was entitled to a drawback from the Treasury in an amount equal to the duty paid upon the export at the time of its importation. The Secretary of the Treasury made certain regulations which resulted in depriving the plaintiff of the benefit of a drawback.

Said the Court through Mr. Justice Miller:

> "'Can the Secretary, by this order, do what he could not do by regulations, repeal or an-

nul the law? Can he thus defeat the law he was appointed to execute, by making regulations and then, by ordering his officers not to act under them and not to act at all, place himself above the law and defy it, * * *

The second section of the Act of September 20, 1850, granting all the overflow and swamp land to the State in which they lie, declares:

'That it shall be the duty of the Secretary of the Interior, as soon as may be practicable, after the passage of this Act, to make out an accurate list and plat of the lands granted, as aforesaid, and transmit the same to the Governor of the State and, at the request of said Governor cause a patent to be issued to the State therefor; and on that patent the fee to the land shall vest in the State.' 9 Stat. at L. 519.

This duty was wholly neglected by the Secretary.

In the case of *R. R.* vs. *Smith*, 9 Wallace 95, it was contended that the failure of the Secretary to act, made these lands subject to a grant for railroad purposes by a subsequent act. This proposition was thus answered by the Court:

'Must the State lose the land, though clearly swamp land, because that officer has neglected to do this?

"The right of the State does not depend on his action, but on the act of Congress, and though the State might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the State to them could not be defeated by this delay. * * * The application of this rea-

soning to the present case is too clear to need illustration. It is an error to suppose that the officers of customs, including the Secretary, are in regard to this law created a special tribunal to ascertain and decide conclusively upon the right to a drawback. *Their function is entirely ministerial.*

They are authorized to pass upon no question essential to the claimant's right so as to conclude him in the Court of competent jurisdiction."

If then a departmental head cannot diminish by executive order the application of a law—and a civil law, at that,—it follows surely that he can not *extend* its application by such an order, especially where the statute is penal in character and therefore must be strictly construed. He cannot make that a crime which was no crime before.

In *U. S.* v. *Eaton*, supra, there was involved an order by the Commissioner of the Interior designed to effectuate an act defining butter and regulating the sale of oleomargarine. Violations of the law were penalized.

Mr. Justice Blatchford, speaking for the Court, observed:

"Regulations prescribed by the President and by the heads of Departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense the force of law; *but it does not follow that a thing required by them is a thing so required by law as to make the*

neglect to do the thing a criminal offense in a citizen where the statute does not distinctly make the neglect in question a criminal offense."

Post Office Order No. 8571, *supra*, if enforced to the degree demanded by the prosecution would make criminal an act of which the Federal Law had taken no previous cognizance. The order would be legislative instead of administrative and in consequence clearly beyond the scope of departmental authority.

This line of reasoning leads irresistably to the same conclusion respecting private mail boxes. The taking of letters therefrom is like taking them out of a man's pocket or a desk drawer. The statute does not make a private receptacle an authorized depository. Then certainly, the Postmaster General may not. Hence the checks received by Pakas were not the contents of a letter stolen or embezzled from a carrier or from out of any post office, branch postoffice, duly authorized depository or mail box.

It is therefore respectfully submitted that the decision of the learned Circuit Court of Appeals sustaining the exercise of dominion of the Post Office Department in this case is wholly erroneous as well as being in conflict with the decisions cited.

CONCLUSION.

In changing the rule which had hitherto obtained with respect to the exclusion of the testimony of a convicted felon, the Circuit Court of Appeals exercised a legislative, rather than a judicial function. In extending the dominion of the Post Office Department over private receptacles for mail, after governmental control had terminated by delivery, the learned Court sanctioned the exercise of legislative and not administrative power by the Post Office Department. In both instances, the rules laid down by the Courts in earlier decisions were departed from.

It is respectfully urged that for all the reasons stated, the judgment appealed from should be reversed.

Respectfully submitted,

TERENCE J. MCMANUS,
Counsel for Petitioner.

ROSEN ET AL. *v.* UNITED STATES.

PAKAS *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 365, 438. Argued December 12, 1917.—Decided January 7, 1918.

Under the modern rule, supported both by legislation and by the very great weight of judicial authority, all persons of competent understanding are permitted to testify to relevant facts within their knowledge, and the former common-law rule disqualifying witnesses convicted of crime will no longer be followed, but such conviction will be given due consideration in determining the credibility and weight of their testimony.

In a criminal trial in a United States District Court in New York, a witness, previously sentenced and imprisoned under the law of that State for the crime of forgery in the second degree, was competent to testify for the United States against his co-defendants, irrespective of whether he would have been disqualified by the rules of competency as they were in New York at the date of the Judiciary Act of 1789. *United States* v. *Reid*, 12 How. 361, is to this extent disapproved.

Under Rev. Stats., § 161, which authorizes the head of each Department "to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the . . . property appertaining to it,"

and under and in supplement of § 194 of the Criminal Code, the Postmaster General by a general order may designate as letter boxes for the receipt or delivery of mail matter all letter boxes and other receptacles which are so used or intended on city delivery or other mail routes; a privately owned box coming within such designation is an "authorized depository for mail matter" within the meaning of the penal section, and a theft of letters from such a box is punishable as the section prescribes. So *held* where the letters were stolen from boxes placed by tenants for receipt of mail in the halls of buildings in which they had their places of business. The boxes bore the names of the owners and were not locked. Mail was deposited in them by the carriers, but not collected from them.

Mail matter which has not reached the manual possession of the addressee, but lies in a private letter box, designated as an authorized depository under the federal law, where it has been placed by the delivering carrier, is still subject to the protective power of the Government.

237 Fed. Rep. 810; 240 Fed. Rep. 350, affirmed.

THE cases are stated in the opinion.

Mr. Terence J. McManus, with whom *Mr. Meier Steinbrink* was on the briefs, for petitioners.

Mr. Assistant Attorney General Fitts for the United States.

MR. JUSTICE CLARKE delivered the opinion of the court.

These two cases present precisely the same questions for decision. They were argued and will be decided together.

In No. 365 Rosen and Wagner were indicted in the District Court of the United States for the Eastern District of New York with one Broder for conspiring to buy and receive certain checks and letters which had been stolen from "duly authorized depositories for mail matter of the United States," and which were known to the accused to have been so stolen. Broder pleaded guilty, and when he was afterwards called as a witness for the

Government the objection was made that he was not competent to testify for the reason that, as was admitted by the Government, he had theretofore pleaded guilty to the crime of forgery in the second degree, in the Court of General Sessions, in the County and State of New York, had been sentenced to imprisonment, and had served his sentence. The objection was overruled and Broder was permitted to testify. This ruling was assigned as error in the Circuit Court of Appeals, where it was affirmed, and it is now assigned as error in this court.

The second claim of error is that the trial court erred in refusing the motion of the defendants to direct a verdict of acquittal on the ground that no crime had been committed, for the reason that the box from which the mail was taken was not "an authorized depository of the mail," and that it was taken therefrom after it had left the possession of the Government.

Broder testified, and it was not disputed, that the letters were stolen from boxes placed by tenants for the receipt of mail in the halls of buildings in which they had their places of business. The boxes bore the names of the owners and were not locked, and while mail was deposited in them by the carriers no mail was collected from them.

In No. 438 Pakas and Broder, the same Broder as in No. 365, were jointly indicted for buying and receiving three designated checks, knowing the same to have been stolen from letters which had been deposited in the United States mail for delivery by the Post Office establishment of the United States. The same questions are presented, raised in the same manner, as in No. 365.

For the validity of the claim that Broder was disqualified as a witness by his sentence for the crime of forgery, the plaintiffs in error rely upon *United States* v. *Reid*, 12 How. 361, decided in 1851. In that case it was

held that the competency of witnesses in criminal trials in United States courts must be determined by the rules of evidence which were in force in the respective States when the Judiciary Act of 1789 was passed, and the argument in this case is, that by the common law as it was administered in New York in 1789 a person found guilty of forgery and sentenced was thereby rendered incompetent as a witness until pardoned, and that, therefore, the objection to Broder should have been sustained.

While the decision in *United States* v. *Reid*, *supra*, has not been specifically overruled, its authority must be regarded as seriously shaken by the decisions in *Logan* v. *United States*, 144 U. S. 263–301, and in *Benson* v. *United States*, 146 U. S. 325.

The *Benson Case* differed from the *Reid Case* only in that in the former the witness whose competency was objected to was called by the Government while in the latter he was called by the defendant. The testimony of the witness was admitted in the one case but it was rejected in the other, and both judgments were affirmed by this court—however forty years had intervened between the two trials. In the *Benson Case*, decided in 1892, this court, after determining that the *Reid Case* was not decisive of it, proceeded to examine the question then before it "in the light of general authority and sound reason," and after pointing out the great change in the preceding fifty years in the disposition of courts to hear witnesses rather than to exclude them, a change which was "wrought partially by legislation and partially by judicial construction," and how "the merely technical barriers which excluded witnesses from the stand had been removed," proceeded to dispose of the case quite without reference to the common-law practice, which it was claimed should rule it.

Accepting as we do the authority of the later, the *Benson Case*, rather than that of the earlier decision, we

shall dispose of the first question in this case, "in the light of general authority and sound reason."

In the almost twenty years which have elapsed since the decision of the *Benson Case*, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent, with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain.

Since the decision in the *Benson Case* we have significant evidence of the trend of congressional opinion upon this subject in the removal of the disability of witnesses convicted of perjury, Rev. Stats., § 5392, by the enactment of the Federal Criminal Code in 1909 with this provision omitted and § 5392 repealed. This is significant, because the disability to testify, of persons convicted of perjury, survived in some jurisdictions much longer than many of the other common-law disabilities, for the reason that the offense concerns directly the giving of testimony in a court of justice, and conviction of it was accepted as showing a greater disregard for the truth than it was thought should be implied from a conviction of other crime.

Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling

of the lower courts on this first claim of error should be approved.

There remains the claim that the boxes from which the letters were stolen were not "authorized depositories for mail matter," and that, therefore, the stealing of the letters from them did not violate § 194 of the Federal Criminal Code, of March 4, 1909, under which petitioners were indicted.

Section 194 provides that:

"Whoever shall steal, take, or abstract . . . from . . . any . . . *authorized depository for mail matter* . . . any letter . . . or shall abstract or remove from any such letter . . . any article," etc., shall be fined, etc.

Section 161 of the Revised Statutes of the United States provides:

"The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the . . . property appertaining to it."

A regulation promulgated as an order of the Post Office Department prior to the dates on which the defendants are charged with having committed the crime for which they were indicted was introduced in evidence and reads as follows:

"Any letter box or other receptacle intended or used for the receipt or delivery of mail matter on any city delivery route . . . or other mail route is hereby designated a letter box for the receipt or delivery of mail matter, within the meaning of the Act of March 4, 1909."

This regulation was obviously intended to supplement § 194 of the Criminal Code, under which the defendants were indicted, by supplying the detail which Congress contemplated should be so supplied when it left unde-

fined "or other authorized depository for mail matter." Such a regulation, if fairly within the scope of the authority given by Congress to make it, has the force and effect of law, and violations of it are punishable under the act which it supplements.

That § 194 contemplates that its general language shall be made definite by such order is plain, and that the order is well within the authority conferred upon the Postmaster General by Rev. Stats., § 161, cannot be doubted, prescribing, as it does, a rule for the conduct of carriers in the discharge of their duties in the delivery of mail and for safely preserving the property committed to the care of the Department until it shall reach the persons to whom it is addressed. This satisfies the law. *Searight* v. *Stokes*, 3 How. 151–169; *Ex parte Reed*, 100 U. S. 13, 22; *United States* v. *Grimaud*, 220 U. S. 506; *Light* v. *United States*, 220 U. S. 523; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389.

The suggestion that when the mail was deposited in a privately owned box it passed out of the custody of the Government and beyond the protection of the law does not deserve extended notice. The letters which were stolen did not reach the manual possession of the persons to whom they were addressed, but were taken from an authorized depository over which the act of Congress, by its express terms, extended its protection until its function had been served.

It results that the judgments of the Circuit Court of Appeals must be

Affirmed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS dissent from so much of the opinion as departs from the rule settled in *United States* v. *Reid* and *Logan* v. *United States*, which they think is in no way modified by what actually was decided in *Benson* v. *United States*.